No. ———

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.
Petitioner

vs

MANUFACTURERS CASUALTY
INSURANCE COMPANY
Respondent

COPY OF APPENDICES IN UNITED STATES COURT OF APPEALS

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No. 12815

United States Court of Appeals

FOR THE SIXTH CIRCUIT

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Appellee.

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the District Court of the United States, from The Southern District of Ohio, Western Division, at Dayton

JEROME GOLDMAN
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APPENDIX

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In the
UNITED STATES DISTRICT COURT
Southern District of Ohio, Western Division.

Civil 1622
at Dayton, Ohio

THE SUCHER PACKING CO.,
Plaintiff.

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Defendant.

STATEMENT OF RELEVANT DOCKET ENTRIES

* * *

11-29-54 Second amended complaint filed.

11-29-54 Trial commenced—jury impaneled and sworn, plaintiffs testimony not concluded.

11-30-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 1-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 3-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 6-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 7-54 Trial continued, plaintiffs testimony continued but not concluded.

12- 8-54 Trial continued, plaintiff's testimony continued but not concluded.

12- 9-54 Trial continued, plaintiffs testimony concluded, plaintiff rests.

Statement of Relevant Docket Entries

12-13-54	Answer of defendant filed.
12-13-54	Trial continued, not concluded.
12-14-54	Trial continued, defendants testimony concluded and defendant moves for dismissal or directed verdict, overruled.
12-15-54	Trial continued, final arguments to jury continued to 12-16.
12-16-54	Charge to jury, jury retires.
12-16-54	Special verdict filed.
12-27-54	Judgment on special verdict filed — Plaintiff to recover $83.00 with interest at 6% from Jan. 3, 1951 and costs — copies mailed to attorneys.
1- 5-55	Motion of plaintiff to set aside verdict and judgment and for new trial filed.
12-12-55	Order overruling motion for new trial filed.
1- 9-56	Notice of appeal filed.

SECOND AMENDED COMPLAINT

Now comes the plaintiff and says that the plaintiff, The Sucher Packing Co., and defendant, Manufacturers Casualty Insurance Company, are corporations and were such at all times hereinafter mentioned.

Plaintiff says that on or about the 30th day of December, 1947, the said defendant issued an insurance policy to plaintiff and entered into an agreement with the plaintiff in consideration of the payment of an agreed premium which plaintiff paid to defendant whereby defendant insured plaintiff against, and agreed to indemnify the plaintiff for, all loss sustained by the plaintiff during the period of three years beginning the 1st day of November, 1947,

through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication or other dishonest or fraudulent act or acts committed anywhere by any of the employes of plaintiff, acting alone or in collusion with others, including loss of money and securities and other property through any such act or acts of any of such employes, and including that part of any inventory shortage caused by dishonesty or fraud on the part of any employes of plaintiff.

Plaintiff says that on or about the 11th day of September, 1950, it discovered that a number of its employes had been guilty of larceny, theft, misappropriation, wrongful abstraction and other dishonest or fraudulent acts causing loss of property to the plaintiff, to-wit, meat products processed by the plaintiff in connection with its business as a meat packer and seller of meat products.

Plaintiff further says that said loss to plaintiff through the larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of employes of the plaintiff, acting alone or in collusion with others, occurred during the period of three years beginning the 1st day of November, 1947, amounting to a loss of Eighty-two Thousand, Eighty-one Dollars and Ninety-four cents ($82,081.94) on fresh pork; Fifty-four Thousand, One Hundred Three Dollars and Eighty-nine Cents ($54,103.89) on smoked pork; and Ten Thousand, Three Hundred Ninety-two Dollars and Seventy-four Cents ($10,392.74) on sausage; or a total of One Hundred Forty-Six Thousand, Five Hundred Seventy-eight Dollars and Fifty-Seven Cents ($146,578.57). Plaintiff says that it was able to obtain from some of the employes through whose acts such loss was caused, the sum of Two Hundred Eight Dollars ($208.00) as partial restitution. Plaintiff says that under the terms of said policy of

insurance and indemnity agreement hereinbefore referred to, it notified defendant of said loss and filed sworn proof of claim as provided in said policy and indemnity agreement, and credited said defendant with said sum of Two Hundred Eight Dollars ($208.00) hereinbefore referred to making a net claim against said defendant in the sum of One Hundred Forty-Six Thousand, Three Hundred and Seventy Dollars and Fifty-Seven Cents ($146,370.57) under said policy of insurance and indemnity agreement.

Plaintiff says that said notice and sworn proof of claim were made as required by said policy and agreement and that plaintiff has done and performed all required of it under the terms of said policy and agreement, entitling it to receive from the defendant the amount of its loss aforesaid. Plaintiffs says that the defendant has failed and refused to pay the amount of said plaintiff's loss, and that more than ninety days have elapsed since proof of loss as required by said policy and agreement has been furnished defendant, and that at the time of filing the complaint herein less than two years have elapsed since the date upon which said loss was discovered by plaintiff.

Plaintiff says that by reason of the terms of said agreement and policy, plaintiff is entitled to be paid the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57) by the defendant, but that the defendant has failed and refused to pay said sum, to plaintiff's loss and damage against which said defendant insured and agreed to indemnify plaintiff all to plaintiff's damage in the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57), together with interest thereon from the date of demand of plaintiff, to-wit, the third day of January, 1951.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of One Hundred Forty-Six Thousand, Three Hundred Seventy Dollars and Fifty-Seven Cents ($146,370.57), together with interest at six percent (6%) per annum from the third day of January, 1951, until paid, and its costs herein expended.

. . . . . .

. . . . . .

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ANSWER

(Filed December 13, 1954)

Comes now the defendant, Manufacturers Casualty Insurance Company, and for its answer to plaintiff's second amended complaint herein filed on November 29, 1954, admits, denies and avers as follows:

1. Admits the averments contained in paragraph 1 of plaintiff's second amended complaint.

Answer

2. Admits that on December 30, 1947, defendant issued an insurance policy to plaintiff for which plaintiff paid a premium, but denies all other averments contained in the second paragraph of plaintiff's second amended complaint. Avers plaintiff has failed to correctly quote the provisions of the policy issued by defendant to plaintiff on December 30, 1947, and has omitted pertinent relevant portions of said policy.

3. Admits that on September 11, 1950, plaintiff discovered one of its employees committing a dishonest act which caused a depreciation in and loss of meat products processed by plaintiff, but specifically denies that any loss resulting to plaintiff from dishonest acts of its employees amount to One Hundred Forty-Six Thousand, Three Hundred Seventy and 57/100 ($146,370.57) Dollars and demands of plaintiff strict proof thereof.

4. Defendant denies the averments contained in paragraphs 4, 5 and 6 of plaintiff's second amended complaint except that it has failed and refused to pay plaintiff One Hundred Forty-Six Thousand, Three Hundred Seventy and 57/100 ($146,370.57) Dollars.

5. Defendant denies all averments contained in plaintiff's amended petition not herein specifically admitted to be true.

6. Defendant avers that in the policy issued to plaintiff, the maximum liability for loss arising from the dishonest acts of any identifiable employee shall not, in any event exceed Twenty Thousand ($20,000.00) Dollars and that if the insured be unable to designate the specific employee, the maximum of the company's liability for all loss arising because of the dishonest acts of undesignated employees shall not in any event, exceed Twenty Thousand ($20,000.00) Dollars.

Answer

7. Defendant further avers that under the policy provisions, if such loss consists in whole or in part of inventory shortage, plaintiff must prove conclusively that such inventory shortage was in fact due to the dishonest acts of one or more of its employees.

8. Defendant further avers that under Condition 6 of the policy issued by defendant, plaintiff was required as soon as practicable, but in any event not later than fifteen (15) days after discovery by the plaintiff of any loss or of any occurrence which may give rise to a claim, to give the company written notice thereof, at its home office in Philadelphia, Pennsylvania, and within four (4) months after such discovery to file with the company affirmative proof of loss daly sworn to and upon request of the company to render every assistance not pecuniary in its power to facilitate the investigation and adjustment of any claim exhibiting for that purpose any and all books, papers, vouchers bearing in any way upon the claim made and submitting itself and its associates in interest and also, so far as it is able, its employees to examination and interrogation by any representative of the company, under oath, if required, that plaintiff failed to give defendant written notice at its home office as soon as practicable and within fifteen (15) days after discovery of any loss or any occurrence which may give rise to a claim and failed to file affirmative proof of loss thereof and failed to otherwise comply with the provisions of Condition No. 6.

9. Defendant avers that its policy contained other terms, conditions and provisions, all of which are known to plaintiff and all of which are incorporated herein as if set forth in detail.

WHEREFORE, having fully answered, defendant prays that plaintiff's second amended complaint be dismissed.

PICKREL, SCHAEFFER & EBELING

By .....
Member of the Firm
608 Gas & Electric Building
Dayton 2, Ohio
Attorneys for Defendant.

Copy delivered to attorneys for plaintiff.

.....

SPECIAL VERDICT

(Filed December 16, 1954)

We, the Jury, herein do find the following facts:

1. That the plaintiff, The Sucher Packing Company, and the defendant, Manufacturers Casualty Insurance Company, are corporations and were such at all times alleged in the second amended complaint. Part

2. That on December 30, 1947, the defendant issued an insurance policy to plaintiff for which the plaintiff paid a premium, a true copy of said policy being plaintiff's exhibit No. 9 admitted into evidence. Yes.

3. That the plaintiff notified John L. MacBeth, agent of the defendant, by telephone on or about September 12, 1950, that it had sustained a loss. Yes.

4. That the plaintiff prepared a paper entitled proof of loss which is plaintiff's exhibit No. 11a, admitted into evidence, and that said proof of loss was received in the mail by the defendant company at its home office on or about January 5, 1951. Yes.

Special Verdict

5. That on September 11, 1950, William Harris and James Jackson were apprehended at the plaintiff's plant in an alleged act of larceny and as a result thereof, each was subsequently convicted of grand larceny; Yes.

6. That the defendant admitted by plaintiff's exhibits No. 17 and 20, admitted in evidence, that plaintiff sustained a loss in the amount of $291.14; Yes.

7. That the plaintiff withheld wages of employees in the sum of $208.00, and Yes.

8. That Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff on or before November 25, 1948. Yes.

William Harris

That William Harris was regularly employed by the plaintiff on or about July 26, 1950. Yes.

Was William Harris employed by the plaintiff at any time prior to the above date? Yes.

If so, give date or dates of previous employment. Week of April 26, 1950 3 days.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris? Yes.

If you find William Harris committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. July 26, 1950 to Sept. 11, 1950. The time of Wm. Harris permanent employment according to testimony. Including April 26, 1950, 3 days as evidence introduced by time card.

(2) The nature of the dishonest act or acts. Theft of Pork meats.

Special Verdict

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See No. 8.

(4) The approximate weight in pounds, of each item. See No. 8.

(5) Were any such dishonest act or acts committed by William Harris alone, or in collusion with any of the following-named employees: James Jackson; Willie Early; Helen Hurt or Robert Maiden? Yes.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. James Jackson.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(No. 7 is stricken out)

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by William Harris.

James Jackson

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of James Jackson? Yes.

If you find James Jackson committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. Sept. 11, 1950.

(2) The nature of the dishonest act or acts. Theft of meats.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note 8.

Special Verdict

(4) The approximate weight in pounds, of each item. See note 8.

(5) Were any such dishonest act or acts committed by James Jackson alone, or in collusion with any of the following-named employees: Willie Early, William Harris, Helen Hurt or Robert Maiden? Yes.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. William Harris.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(No. 7 is stricken out)

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by James Jackson.

Robert Maiden

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Robert Maiden? No.

If you find Robert Maiden committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note No. 7.

(4) The approximate weight in pounds, of each item. See note No. 7.

Special Verdict

(5) Were any such dishonest act or acts committed by Robert Maiden alone, or in collusion with any of the following named employees: James Jackson; William Harris; Willie Early; or Helen Hurt. See note No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See note No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Robert Maiden committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Robert Maiden.

Helen Hurt

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Helen Hurt? No.

If you find Helen Hurt committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See No. 7.

(4) The approximate weight in pounds of each item.

Special Verdict

(5) Were any such dishonest act or acts committed by Helen Hurt alone or in collusion with any of the following-named employees: James Jackson; William Harris, Willie Early; or Robert Maiden? See No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Helen Hurt committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Helen Hurt.

Willie Early

We find that Willie Early was employed by the plaintiff on or about July 3, 1950.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of Willie Early? No.

If you find Willie Early committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of facts upon the following things in relation thereto.

(1) The date or the time during which such dishonest act or acts occurred. See note No. 7.

(2) The nature of the dishonest act or acts. See note No. 7.

(3) The number of hams, shoulders or bacon taken, if you find any were taken. See note No. 7.

Special Verdict

(4) The approximate weight in pounds of each item? See note No. 7.

(5) Were any such dishonest act or acts committed by Willie Early alone, or in collusion with any of the following-named employees: James Jackson; William Harris; Helen Hurt or Robert Maiden? See note No. 7.

(6) If they were committed in collusion with any of the above-named persons, give the names of such person or persons. See note No. 7.

STRIKE OUT EITHER 7 OR 8 OR BOTH OF THEM IF NOT APPLICABLE

(7) We find that there is insufficient evidence to make a finding by preponderance of the evidence that Willie Early committed any dishonest act or acts.

(8) We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by Willie Early.

Do you find that the plaintiff withheld from the defendant papers, books, vouchers or any records bearing in any way upon the claim made in this case, for which the defendant made a request? No

If so, what was withheld?

If you find that the plaintiff sustained any loss due to the dishonesty of any of the above-named five employees list the total amount taken by all employees, of each item in pounds.

POUNDS

_____ Ham

_____ Shoulders

_____ Bacon

We find insufficient evidence to determine any estimate of pounds taken by any of employes named

JUDGMENT ON SPECIAL VERDICT

This cause came on for trial before the Court and a Jury on November 29, 1954, both parties appearing by counsel, and the Court having directed the jury to find a special verdict, and the Jury having found such verdict, the Court directs judgment for the plaintiff on such verdict in the sum of Eighty-three ($83.00) Dollars.

It is hereby ORDERED, ADJUDGED and DECREED that plaintiff recover of the defendant the sum of Eighty-three ($83.00) Dollars with interest at the rate of six per cent (6%) per annum from January 3, 1951, and its costs of action.

Judge, United States District Court
Southern District of Ohio
Western Division

4 MR. GOLDMAN Your Honor, at this time the plaintiff moves the Court to have the jury view the premises.

9 THE COURT I will overrule the motion for view of the premises.

Testimony of James Jackson
DIRECT EXAMINATION

25 Q Will you state your name, please?
A James Jackson.
Q What is your address, Mr. Jackson?
A 534 South Broadway.

Q. Were you at any time an employee at the Sucher Packing Company?

A. I refuse to testify in view of the fact that what I might say might incriminate myself and I invoke the [26] Fifth Amendment of the Constitution of the United States.

Q. Isn't it a fact, Mr. Jackson, that you were involved in some stealing at the Sucher Packing Company?

A. I refuse to answer.

MR. GOLDMAN: What is Your Honor's statement in that regard? Constitutional privilege is well taken, is it?

THE COURT: May I see counsel at the bench, please?

(Court and counsel confer out of the hearing of the jury.)

Q. Mr. Jackson, isn't it a fact that you were involved in stealing from Sucher Packing Company over a period of time?

A. I refuse to answer.

Q. Didn't you admit to Detective Merica, in September, 1950, that you had been stealing from the Sucher Packing Company for a period of about five years?

A. I refuse to answer.

MR. GOLDMAN: I don't suppose there is any use in pursuing it any further, Your Honor.

THE COURT: You will be excused.

By William Harris:

DIRECT EXAMINATION

[27] Q. Will you state your name, please?

A. William Harris.

Q. Were you ever employed at the Sucher Packing Company?

A. That's right.

Q. Were you involved in any stealing at the Sucher Packing Company?

A. That's right.

Q. Mr. Harris, have you been convicted?

A. That's right.

Q. For that stealing?

A. That's right.

Q. Serve your time?

A. That's right.

Q. Now, Mr. Harris, tell what you know about the stealing, starting from the beginning.

A. Well, the whole time I was over there I seen a whole lot of stuff go. I done a whole lot myself. I helped to take a whole lot of it and I seen a whole lot of other stuff go through other people.

Q. Tell us about the part in which you were [28] implicated.

A. I helped to haul it. I helped to put it in barrels.

Q. About when did this start?

A. Along in 1948.

Q. And how did you get into the stealing?

A. Through Jackson.

Q. James Jackson, the man just left the court room?

A. That's right.

Q. What was your job at Sucher's?

A. Well, I was janitor, all over the place. I was working everywhere, in and out.

* * *

[29] Q. Tell us what you did, will you please?

A. I helped to put meat in barrels and I helped to haul it.

Q. When you put it in barrels, how was it disposed of?

A. Covered up with trash on top of it.

Q. How often did that occur?

A. It went on for almost two years, and some days I took as high as three trucks with four or five barrels on each time.

Q. Well, now how frequently did it occur?

A. Frequently –

Q. How often did it occur during that period?

A. Mighty near every day; every day we got a chance.

Q. Now, in addition to Jackson, could you name any of the other people who were involved?

A. Well, I don't know the other peoples names.

Q. Do you know the name of Robert Maiden?

A. Yes, I know him.

Q. Was he one of those who was involved?

[30] A. Yes.

Q. Do you know the name of Helen Hurt?

A. I know her.

Q. Was she one of the ones involved?

A. Yes, she was involved.

Q. How long were they involved?

A. They was there before I got there.

Q. Were they involved in the stealing when you started?

A. Yes.

MR. SELVA: If the Court please, we have refrained from objecting to leading statements, but we do so at this time.

THE COURT: I will sustain the objection.

MR. GOLDMAN: As to the last question, Your Honor?

THE COURT: Yes. I think it is too broad and calls for a conclusion, were they involved. What did they do?

Q. What did they do, Mr. Harris?

A. They helped do the same thing I did outside of hauling it.

Q. They did the same thing you did outside of hauling it?

A. That's right.

Q. What kind of meat was taken?

A Hams, shoulders, middlings, that's bacon, [31] and some parts of other meat you could slice and put in your pockets.

Q Was the meat you took pork or beef?

A Hams and shoulders and bacon. That is what I taken.

* * *

THE COURT: Well, if he knows, he can testify as to what he knows and I think give times that he is referring to.

MR. GOLDMAN: Your Honor, he said it was almost daily. He said "most every day" or words to that effect.

Q Put it this way, Mr. Harris: On the days that meat was taken away in the manner in which you have described, about how much was taken away?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

MR. SELVA: Exception.

A Some days it was four or five barrels and [32] some days eight. I have took out eight in one day.

Q About how many hams would be in a barrel, if you had hams?

A Some of them, big ones, could put six in there; others could put eight or ten; that is according to size.

* * *

Q How much bacon was put in a barrel?

A Well, I would say you could put about twenty, twenty-five slabs of bacon in a barrel, if you pack it in right.

Q Were any pork loins ever taken?

A Pork loins, cut them up some, you can stick down in your pocket. I seen that. We never take no pork loins. I seen them take some away. We didn't. I didn't.

[33] Q You saw others take pork loins?

A That's right.

Q. Now how prevalent was the taking of meat by other employees?

A. I should say some every day left there.

Q. Now, on September 11, 1950, were you caught?

A. I was caught.

Q. What were you doing at that time?

A. I was hauling – driving a truck at that time.

Q. At that time you were hauling the truck?

A. That's right.

Q. That the trash truck?

A. That's right.

Q. What was the arrangement between yourself and the others who participated as to how you divided up, if you had any such arrangement?

MR. SELVA: We object, if the Court please.

THE COURT: I think you will have to limit it to what they did do with it, not what their arrangements were.

Q. What did you do with the proceeds?

A. I took it different places.

Q. You mean you took the meat to different places?

A. Yes.

Q. Now about the times you were not a driver, [34] when you were assisting without being the driver?

A. I just helped put it in the barrel. I don't know what all places it did go at that time. I just helped load into the barrels.

MR. GOLDMAN: Read the answer. I didn't get it.

(Thereupon the last A. was read by the reporter.)

Q. Well, what happened to this meat after it was taken to these other places? Was any money paid for it after the people got it?

A. There was money paid for it.

MR. SELVA: We object to these questions, unless this witness knows.

THE COURT: Find some time when he took it.

Q. I am referring now as to when you were the driver.

A. I collected money every time I took it.

Q. How much was your share when you were the driver?

A. Some days I got as high as $50 to $70, my part of it. They run two hundred and something.

Q. Now, when you were not the driver, you just helped put it in the barrels?

A. About $15 a day.

Q. You say $15 a day?

A. $15 to $18.

[35] Q. You stated that you saw a number of other employees, whose names you don't know —

A. That's right.

Q. (Continued) — take meat products and put it in their pockets, small quantities?

A. That's right.

Q. How often did you observe that?

A. Every day.

Q. How many employees? Could you estimate?

A. One-third of them.

MR. GOLDMAN: I think that is all, Your Honor. Just a moment until I inquire. (Consults with co-counsel.)

Q. Mr. Harris, you refer to items of fresh and smoked pork?

A. That's right.

Q. You helped to take away?

A. That's right.

Q. Did you ever take away any sausage?

A. I never took no sausage. There was some sausage taken. I never took sausage away. I always took big pieces, shoulders.

Q. Who took the sausage?

A. I know they work there. I don't know the people.

Q. Did you see it taken?

[36] A. Yes. Take them out and put them in the pocket, what they could carry in their pockets, you know.

Q. The people you saw take the stuff were other employees?

A. That's right.

Q. You don't know their names?

A. No.

Q. Do you remember, in connection with taking meat away by the barrel, you remember a man, Willie Early, a janitor over there?

A. I know him just a few days. I don't know much about him. He just there a short time.

Q. Was he one of those participated with you?

A. Yes.

MR. SELVA: I object, unless there is a showing that these people are not available.

THE COURT: He can testify to anything Early did he saw himself or knows about of his own knowledge.

Q. What did Willie Early do?

A. He helped load it.

Q. Any other persons besides Robert Maiden, Helen Hurt, Willie Early, James Jackson, yourself, that you can name?

A. They was all involved with me. Rest of them took it out in their pockets.

[37] Q. Those are the only ones involved with you?

A. That's right.

Q. And the others took it out in their pockets?

A. That's right.

Q. You say you don't remember the names of any of them?

A. No. I don't know their names.

Testimony of Kenneth Smith
DIRECT EXAMINATION

[53] Q. What position do you hold in Sucher Packing Company?

A. I am vice-president in charge of pork operations.

Q. Prior to the time you were vice-president in charge of pork operations, what position did you hold?

[54] A. Part of that time I was comptroller of the company.

Q. When did you first come to the Sucher Packing Company?

A. December 1947.

Q. And prior to December 1947, what was your experience, if any, in the packing industry?

A. I worked for the High-Grade Food Products Corporation for 18 to 19 years prior to that time.

Q. Does that company operate packing plants?

A. Yes, sir, it does.

Q. How many plants do they have?

A. At that time, they had perhaps in the neighborhood of 40 units.

Q. Forty different units?

A. Yes.

Q. What was your function with that company?

A. At the time I left them, I was in the executive office in New York for a year and a half, and prior to that time I was district comptroller, supervising accounting records and one thing and another for 13 different units, and prior to that time I had been at the Buffalo, New York plant. I started there in the plant and worked on various time studies and product tests, for a number of years. I was plant clerk.

[55] Q. What does he do?

A. Well, he has supervision of all clerical functions in the plant and makes various product tests, to determine shrinkages and product costs and what happened to the product values of the specific lots through the operation.

Q. While you were with the executive offices of High Grade, in New York, what was your function there?

A. Main function was to examine, or one of the main functions was to examine the product analysis reports from the different plants to determine any irregularities, items which might be questions, that we would want an explanation for in their operations, in general, consolidate their P. & L. statements.

Q. In your experience with High-Grade, did you come to learn about shrinkage of meat products due to evaporation?

A. Yes. We made various tests of the starting weight as compared to the sold weight. We would follow it right through from the beginning to the end of the operation and take several weighings through the operation.

Q. Let me ask you this, Mr. Smith, in December 1947, you say you came to Sucher Packing Company as comptroller?

A. That's right.

Q. What function did you have there in connection [56] with product analysis?

A. Well, I think perhaps the main reason I was employed there was to install a system to determine what was happening to the product, something that they could trace the product throughout to build up a cost system. Those records did not exist there prior to that time.

Q. Would you tell the Court and jury just what happens to the carcass of the animal after the same is slaughtered, taking it through the packing plant as it was done at Sucher's. Take pork, for example?

A. All right. We buy the live animal and slaughter it, and after it is slaughtered we have the dressed carcass which we weigh just prior to going into the cooler.

Q. Would you keep your voice up please, Mr. Smith?

A. All right. We slaughtered the animal and dress it on the cooling floor. The dressed carcass is [57] weighed.

Q. Will you describe what a dressed carcass is?

A. A dressed carcass is the animal with the head off and the insides cleaned out; the hair shaved off and passed Government inspection. In other words, we remove the intestine and the head and that is about it.

Q. In other words, the dressed animal is its condition after the exterior is removed and the inedible interior?

A. That is correct. In other words, that is the part of the animal in the case of pork, that we cut up into loins, hams, picnics.

Q. When you speak of a "picnic", what do you mean?

A. That is the shoulder part of the ham. The entire cut is known as skinned shoulder, that is comprised of picnic and Boston.

Q. Mr. Smith, at Sucher's what was done at the time you got there with respect to checking on what happened to meat products?

A. Well, first, I got there, we ordered numerous scales to place at various points throughout the plant where we could catch weights as the product entered the department. And then we closed up a lot of windows and changed the locks, several times, in fact, changed our watching system because [58] we were very concerned with the product getting away. At first we wanted to be sure we had definite controls established so we could determine just what was what.

Q. Now, how long was it before you had the system — that system of controls set up that you got there, do you recall?

A. Oh, it would be towards fall of 1948 before it was completed. Although, prior to that time in various departments, without having the entire system, we would make various test checks, more or less to train these people in clerical operation which we wanted done, but it would be towards the end of 1948 before it was functioning.

Q. After it was functioning toward the end of 1948 will you describe to the Court and jury just how the meat product was handled when it was weighed, what records were kept and so on?

A. First, we were concerned with the live stock that we purchased and we wanted to be sure that everything that we paid for we killed, or processed in our plant. So, we established a live stock summary book to tie in the accuracy of that record. The number of animals that the plant killed were reconciled with the number of animals purchased.

All right. Then, from that point we assured ourselves that we received everything that we paid for. Then [59] our next control was placed on the killing floor. That is what we call the hot weight scale where the carcasses go by one at a time and are weighed into the cooler.

Q. That is, the carcasses of the dressed hogs are weighed individually on the scale before it goes in the cooler?

A. That is right, and also on the cooling chain we have one of these trip counters that also counts the hogs as they go by to be sure we are getting the proper number.

Q. Keep track of every one?

A. That is right.

Q. Wht happened after the hog was weighed before it went in to be chilled and cooled?

A. I am afraid I did not hear you.

Q. What happened after each dressed hog was weighed before it went in to be chilled and cooled?

A. After it was weighed, next morning we would cut this animal up into primary cuts. Part of the products would go down to cure for further processing.

Q. What do you mean, go down to cure?

A. That would mean transfer to the curing where they would be placed in during fore parts for smoking.

Q. What parts would be for smoking?

A. The hams, the bellies, the picnics and that is about all.

[60] Q. Now, were the parts that were taken out to go to be cured, were they weighed?

A. Yes.

Q. Was a record of those weights kept?

A. Yes, a record was kept of each individual vat. In other words, they would be cured in vats holding 1400 pounds, and they would be weighed and counted into those vats, and also there would be various — or be quantities of fat taken off the animal which would be weighed and transferred to the lard department, which would be rendered into lard.

Q. Was the fat that was taken off and sent to the lard department weighed and a record kept of its weight?

A. Yes sir, it was.

Q. Now, what else transpired?

A. Well, the other cuts, such as the loins, and the Boston butts, would be held in the cooler for [61] shipment out that night. Incidentally, most of the shipping is in the night time. We process during the day. That is, a majority of the product is shipped out at night on our various routes. And then, at the same time, we were putting products in cure, we would remove products from cure that had been put down several days prior, and reached cured age, and that would be transferred up to the smoke house.

Q. Coming back to the still fresh meat, in addition to the parts that were taken to the curing department, and the parts taken to the lard department, were any parts taken to the inedible department?

A. Yes, there would be certain items that would be taken to the inedible department. And they would nominally be scrapings on the floor, any pieces, parts, of the animal or feet, or something like that, that we did not care to clean. In other words, the idea was that we weighed the animals into the cooler and everything we took off of those animals we wanted to catch the weight on, so that we could try to account for what went in the cooler.

Q. Now, the part that went to the inedible department was that also weighed?

A. Yes, sir.

Q. And a record kept?

A. Yes, sir.

Q. About what percentage of the fresh pork [62] retained its identity as fresh pork as distinguished from smoked or cured or lard or inedible?

A. That would consist of mostly your pork loins and your Boston butts and your spareribs, which would roughly be from one-quarter to one-third of the animal.

Q. You described now how the dressed hog was weighed and how the various parts that were taken to other departments were weighed and a record kept of the same. When was the remaining product, the loins and the spareribs and butts, you mentioned, when were they weighed again?

A. In the accounting system, we would charge the fresh pork department for the pork carcasses which it received. We would credit that department for the products we mentioned before which were weighed and transferred to other departments, either for lard or curing. Now, the credit to the fresh pork on the remaining would be credited to them

through sales invoices, as the product was billed out, then these sales invoices are analyzed and credited to the department involved. In other words, the pork would be credited to the pork department, the smoked to the smoked.

Q. Was the pork that was sold weighed before it was sold?

A. Oh, yes, weighed and check-weighed.

Q. Wat that weight recorded?

A. Yes, sir.

[63] Q. In your experience in something over twenty years in the packing industry, do you have any knowledge as to whether or not pork products shrink in weight through natural causes?

A. Yes.

Q. Would you describe what th t is?

A. Yes, when we weigh these ho s on the cooling chain, we obtain what we call a hot weigh t. That weight for cost purposes is shrunk three percent. That three percent provides for the cooler shrinkage and any cutting shrinkage you might have. In other wor ds, it is to take care of any shrinkage through the entire p ocess.

• • •

Q. Have you ever made any actual tests of pork products to determine the amoun of shrinkage?

A. Yes.

Q. Through this operati on?

A. Any number of tests because we are always pretty much concerned whether this shrinkage that we were allowing was adequate to take care of normal shrinkages and [64] we found that it has been more than adequate on the cooler shrinkage, that part that you lose through evaporation amounts to about one and three-quarter percent, whereas we make an allowance of three percent.

Q. Now, did the Sucher Packing Company keep records showing the weight of the animal as it would – so-called hot weight as you have described it, and directed to the various parts that were taken off and sent to other departments and sales weight?

A. Yes.

Q. And did they compute the actual amount left?

A. I am afraid I did not quite get your question. When you say "the actual amount left", that is the part I don't quite understand.

Q. Did you have records from which you could compute the amount that you should have left based on the weight that you mentioned and based on the normal or natural shrink that the product would naturally have?

A. Yes. We maintained those sort of records and they indicated that we were not getting all from the product we should be.

MR. SELVA: We object to the indication. They did maintain the records.

THE WITNESS: The records show. I will put it.

THE COURT: All right, with the correction he may [65] go ahead.

THE WITNESS: All right.

A. (continued) The records show that there were many shortages throughout the plant.

MR. SELVA: If the Court please, we move the answer be stricken because the records speak for themselves.

THE COURT: Sustain the objection. The answer may be stricken.

MR. GOLDMAN: Mark this as Plaintiff's Exhibit 1.

Thereupon a number of ruled sheets were marked for identification as **Plaintiff's Exhibit 1.**

Q. I hand you, Mr. Smith, what has been identified as Plaintiff's Exhibit 1, and ask you to describe what this sheaf of papers is?

A. All right. This is our live stock summary.

Q. What does it show?

A. On this record it shows the various lots of animals which were killed during the week. It also reconciles the kill with the animals that we purchased.

Q. What is the purpose of that reconciliation?

A. The purpose of that reconciliation is to ascertain we were starting out on the correct foot, with the correct weight. We have tied it up at two points.

Q. What else does the record show?

A. The record shows the dressed weight of the animals that were slaughtered, during that week of its operations. It shows the number of animals that were purchased and the live weight, and the dressed weight. It also reconciles it into our voucher register.

Q. I notice some items marked "credits". What are those?

A. Those are official credits. That is, credits for the hearts, and livers, and the items that are removed during the killing process. In other words, they are credited to the original cost of the live animal and what is left is the cost of the dressed animal.

Q. And for what period of time does this particular exhibit cover?

A. This particular exhibit covers from January 15, 1949 until the week ending October 7, 1950.

MR. PICKREL: How many pages, please, in that exhibit? Don't you have them numbered?

THE WITNESS: No. They are not numbered. They are dated.

MR. PICKREL: What are those dates?

THE WITNESS: Week ending January 15, 1949 through week ending October 7, 1950.

Q. Would you take off the sheets after the week ending September 9, 1950?

A. All right. (Witness does as requested by counsel

MR. PICKREL: Just goes to September 9th then?

MR. GOLDMAN: I am taking off the others because they will relate to other figures we are going to offer.

I wonder if you would mind remarking this much of it

Thereupon a number of ruled sheets were marked for identification as **Plaintiff's Exhibit No. 1-A**

* * *

[69] Q. Mr. Smith, under whose supervision were those records made up?

A. The biggest part of them were made under my supervision. I do not just recall the day Mr. Solomon became comptroller.

Q. As the vice president in charge of pork operations these records are in your custody and control for that department?

A. Yes. They are vitally interested in them.

* * *

[70] Q. I hand you a group of documents opposing counsel has had these, your Honor ask you what those are?

A. These are product analysis reports.

Q. What period of time is covered by the papers that you have there?

A. Starts December 4, 1948.

Q. Is that the week ending December 4th?

A. That is the week ending December 4th through October 22, 1949.

Q Now, will you tell us what these papers contain?

A Yes. That is a product analysis report that analyzes the movement of the product throughout the plant. The first column here is the opening inventory. The next column is purchases, a part of which came from this live stock summary, and then there is transfers in and out of the departments.

Q When you speak of transfers in and out of the department, are those the transfers you referred to, curing department, lard and so on?

A That is correct. The other column is sales and closing inventory. Each period these purchases and sales are tied in with our general ledger to be sure of the accuracy of the figures on this analysis report.

[71] Q And are the figures on the transfers taken from the actual records of weights?

A That is right. They are taken from the movement of product at the time and the big movement of product is from pork to curing department, and in curing department we have an additional check inasmuch as we make a cut check, and everything that is charged to that department has to be transferred out.

Q Is smoked pork also covered on those sheets?

A Yes, it is.

Q When is the smoked pork weighed?

A The smoked pork is weighed after the smoking process. In other words, it enters the smoke process as a cured ham and piece of bacon, or picnic, and comes out as a smoked product, at which time it is weighed and placed in a cooler for sale, to be packed into orders. That product is sold both unwrapped and wrapped. We try to catch the flow of products in the smoke to take care of the items that we anticipate shipping that particular night, and, I say, product goes out both wrapped and unwrapped, and the next day it is wrapped and placed in boxes.

Q. I see. As to smoked pork, you maintain the record of weight as it comes out of smoke; is that right?

A. That is correct. And we are also able to compare the record which comes out of smoke with the record [72] which comes out of cure, to be sure that the product is all accounted for at that point.

Q. Now, is there a certain amount of natural shrink in the smoked product, as well as the fresh product?

A. Yes. There is a natural shrink from the time it comes off the smoke until it is ready for sale. That shrinkage varies from one and one-half to possibly two percent.

Q. Have you ever made any tests in your years of experience with High Grade and at Sucher's, as to the amount of natural shrink that pork products will undergo?

A. When you say "pork products", you mean smoked pork products?

Q. Smoked products.

A. Yes. The first day it will go from three-quarter percent to one and one-quarter percent, and the following day maybe one-half percent. Of course, in operation of business you try to hang, for instance, on Monday what you figure you will ship out on Tuesday night, so you move your product out promptly. That that does not move out Tuesday night is usually wrapped to go out the following day.

Q. I take it the product goes out 24 to 36 hours after it comes out of soak?

A. Yes, that is right.

[73] Q. In actual practice, was that done at Sucher's?

A. Yes, very close to that time.

Q. Now, Mr. Smith, are there some other basic records from which this weekly product analysis sheet is taken?

A. Well, of course, your purchases and sales are taken from your books of account, and any transfers they are

based on individual transfers at the time the inventories . . . from weekly inventory records. While the product in all cases other than inventory is weighed, the inventory is not weighed in all cases.

MR. GOLDMAN: Mark this for identification as Exhibit No. 2.

Thereupon a file containing a number of documents was marked for identification as **Plaintiff's Exhibit No. 2.**

Q. Mr. Smith, I have had put in this folder the weekly products analysis sheets for the week ending November 4, 1948 to the week ending October 22, 1949, marked as Plaintiff's Exhibit 2. I will ask you if, for each one of these weekly sheets, there is a folder of papers forming the basis of some of the information contained therein?

A. That is correct.

MR. SELVA: Has that been offered as an exhibit?

MR. GOLDMAN: No, not yet. It has been marked [74] only.

Q. I hand you a file of papers, which I will ask the reporter to mark as Plaintiff's Exhibit 3, and ask you to state what is in that folder, what record?

Thereupon a folder containing a number of documents was marked for identification as **Plaintiff's Exhibit No. 3.**

MR. PICKREL: May I inquire, did he keep that record that he has in front of him?

Q. May I ask under whose supervision that record was kept?

A. These records were kept under my supervision

MR. PICKREL: You did not keep them yourself. You have an accountant or bookkeeper or checker that does it?

THE WITNESS: Yes. They are accumulated from several sources. In the office, they would be proved out more or less.

MR. GOLDMAN: Keep your voice up.

THE WITNESS: They are accumulated from many sources in the plant, but then they are all consolidated at one point in the office. For instance, this first group of records are inter-departmental transfers from one department to another.

MR. PICKREL: Now, right at that point. . . . I am sorry to interrupt . . . do you know that the figures in that group of papers, yellow paper you just held, are correct? [75] Did you ever check them?

THE WITNESS: Yes, I have checked many loads through. I haven't checked every individual load, but you check all operations through a plant as you go through it.

MR. PICKREL: I know. You are checking a lot of things here now.

MR. GOLDMAN: I wonder if Mr. Pickrel could reserve his cross examination until the conclusion of the direct testimony?

MR. PICKREL: I would like to know the beginnings of all these things, not the endings. He has the endings.

THE COURT: I do not think it is necessary that you should personally know every entry on all the documents here that he supervised.

Q. Will you continue, Mr. Smith, telling what documents are there, if they were kept under your supervision?

A. Yes. This next group of records is sales analysis.

MR. PICKREL: Is that for a week or month?

MR. GOLDMAN: In each one of these folders are the papers for that particular week.

MR. PICKREL: One week?

THE WITNESS: One week. That comes from the invoices which were filled on each particular day. There is [76] one sheet for each particular day.

This next group of records are weights of products as it comes off smoke. This is a work sheet of the accountant reconciling from vats in and out of the curing department. This is a record taken of the purchases, taken from the live stock register. This is another reconciliation by the accountant.

MR. SELVA: If the Court please, we object to the live stock records for the same reason that this inventory, or computation, submitted to us starts with the carcass weight processed. Am I correct in assuming that is the beginning point?

MR. GOLDMAN: The live stock weight is relevant insofar as it is double checked against the dressed weight, and the purchases are checked against live stock to account for the number of animals. It is a double check against the dressed animal, the weight of the live stock is not involved, only the number. You understand, Mr. Selva, what I have in mind?

MR. SELVA: I thought we started with the processed weight.

MR. GOLDMAN: That is correct. We do. But these records are supporting . . . partly supporting data because the live stock records show the number of cattle purchased and the number of cattle or hogs, as the case may be, can be [77] then checked against the dressed hogs as a double check against the weights, to make sure you have not left any out. That is the purpose of this. It is corroborating data. It is not directly involved in the computation of the weight, but it is for corroboration.

Q Will you continue, Mr. Smith.

A That is a record of the fats that went to the lard tank. These are records of the various sausage items made during that week. This is just an analysis of the price fluctuations during the week, I would say.

Q That was not transcribed onto the

A No. This was just taken from the records. For instance, they show quantity, inventory, price, market price, gain or loss. In other words, it is a record to show whether your inventory value is over or under stated as far as current market value is concerned.

Q That is not involved in the weights?

A No. This is a consolidation sheet for these various inter-departmental transfers. This is a recapitulation of the transfers during the week, by days. In other words, that is from pork to sausage, from beef to sausage, from pork to cure and from cure to smoke.

Q That is a double check of the previous papers?

A No. They are summarized on this sheet.

Q Summarized?

[78] A. Just a record here to show the number of lard tins we used that week. This is a preliminary report of what our gross profit amounted to.

Q That is not involved in the

A No. It is just a preliminary report. This is an analysis of the payroll by departments.

Q Then that is also not involved?

A This is a recapitulation of the inventory. These are the inventory sheets as they come from the plant. They are entered on this sheet in the office to transfer to the product analysis report.

Q This sheaf of papers constituting a number of papers is the actual inventory record?

A That is right.

Q For that week?

A That is correct.

Q As I understand you then, for each week for which there is a product analysis sheet in this folder, Exhibit 2, there is a folder of the kind you have in your hand, which constitutes the data, the more primary data, from which the figures on the product analysis sheet is made up?

A That is correct.

Q So that for the 47 weeks, from week ending December 4, 1948 to October 22, 1949, contained in Plaintiff's [79] Exhibit 2, there are 47 folders of the kind you have in your hand to match up with it?

A That is right.

MR. GOLDMAN: Would you mark this, please, Exhibit 4?

Thereupon a folder and its contents were marked for identification as **Plaintiff's Exhibit No. 4.**

Q I hand you a folder which has been marked as Plaintiff's Exhibit 4, and ask you what that is?

A This is a group of product analysis reports covering the period week ending November 5, 1949 through week ending September 9, 1950.

Q And am I correct in saying that for each one of those sheets, for each week there is a folder of the kind Plaintiff's Exhibit 3 matching up with that, with the primary data from which the product analysis sheet is taken?

A That is correct.

Q So that for the period from week ending December 4, 1948 to September 9, 1950, there would be 95 folders of this kind, is that right?

A That sounds like the number of weeks.

Q I think there are 47 and 48.

MR. PICKREL: What week is that for, your Exhibit

MR. GOLDMAN: Exhibit 3 is for the week of [80] the 19th of December, 1949.

MR. PICKREL: 12/19/49. Everything but a weather report.

MR. GOLDMAN: Like to offer in evidence, your Honor, Plaintiff's Exhibits 2 and 4, the weekly product analysis sheets.

MR. SELVA: If the Court please, subject to further examination, we probably have no objection, but we would like to check them further. We have had them since noon.

MR. GOLDMAN: Now, wait a minute.

THE COURT: I will withhold passing on them until they have a chance to examine them.

MR. GOLDMAN: Their accountant has had these records a long time. He saw these records a long time ago.

MR. SELVA: Well, at least we may examine them.

Q. Mr. Smith, what precautions or action of any kind did the Sucher Packing Company take during the period that you arrived at Sucher Packing Company until September of 1950, in an endeavor to prevent theft?

MR. SELVA: If the Court please, we object to the conclusion. Only those precautions of which this gentleman has knowledge would be proper.

THE COURT: Within the limits of his knowledge.

Q. Within the limits of your knowledge, Mr. [81] Smith?

A. We knew thefts were occurring.

MR. SELVA: If the Court please, we move

THE COURT: That may be stricken.

Q. Just tell us what was done, not what you knew.

MR. PICKREL: If he knew thefts were occurring that is very interesting.

THE WITNESS: Shall I answer that?

MR. GOLDMAN: That was a comment of counsel. I don't think it was a question.

THE COURT: Answer Mr. Goldman's question.

MR. GOLDMAN: Just answer the question asked.

A. All right. First, we tried to detect likely places where product could be gotten away with. We boarded up windows and cemented in doors and closed them to reduce the number of exits and entrance places to the plant. We changed all locks, and we hired several detective agencies. We changed our watching staff. At one time we had our watchman assigned other duties, but we figured we would eliminate these other duties. We had them perform and we had them do nothing but stand watch this disappearance of product, other than through normal channels. We placed a dock checker at the door where customers would come up and pick up the products and check them out, to be sure that [82] everything was billed.

Q. Before you took these precautions, was there any instance which occurred which gave rise to your doing so?

A. We received many anonymous calls at the

MR. SELVA: If the Court please, that would be hearsay, these anonymous calls that were given to this gentleman.

THE COURT: Sustain the objection.

MR. GOLDMAN: Leave out the anonymous calls.

A. (continued) Walking through the plant, we would notice things.

MR. SELVA: If the Court please.

THE COURT: Just a minute, please. Confine this to what you saw when you were walking through the plant.

MR. GOLDMAN: Refer to yourself then, what you saw, Mr. Smith.

A. In walking through the plant, we noticed trees of hams with maybe one or two hams missing.

Q. Will you explain what you mean by "trees" of hams?

A. It is a rack on overhead rollers on which we hang hams to roll them into the smokehouse during the smoking

process, and when we would put them out there would be . . . hams would be evenly spaced, that would be five hams to a side. They would come out of smoke that way and would [83] come through the cooler. At times I would notice two or three hams missing from a rack, which would have no business to be missing, because the rack as it would go through process would be moved in its entirety, take the whole tree of hams down to the shipping department. We would notice boxes of sliced bacon open with some missing, which would have no reason for being open, because the items were sold in standard sealed packages. I remember one day we killed 14 calves, and the calves' livers were . . .

MR. PICKREL: Pardon me.

THE COURT: Just a minute. I believe there is no claim of any beef shortage.

MR. GOLDMAN: He is giving that as an illustration as to what gave rise to their taking precautions.

THE COURT: All right.

A. (continued) Well, we killed 14 calves that day and veal livers were very scarce and very much in demand. We promised 14 customers veal livers. When they went to fill the orders, there were only 11 veal livers. Three had disappeared within a reasonably short time.

Q. Any experience that you know of, of your own knowledge, with respect to sweetbreads?

A. Yes, we had some cases of that on sweetbreads, too. That was also an item . . . in fact, that happened at about the same time, within a week or two of that. We killed [84] so many animals and part of the sweetbreads would be missing. Those would be items that would be easy for anybody to put in their pocket and get away with and they were a delicacy.

* * *

[85] Q. Mr. Smith, yesterday you had testified concerning the basic data from which the weekly product analysis sheets were made up?

A. Yes, sir.

Q. And I believe you said there was a folder similar to Plaintiff's Exhibit 3 for each week of the 95-week period we were talking about?

A. That is correct.

Q. I will ask you if you had s[illegible] down this morning those folders for each of the 95 we[illegible]?

A. That is correct.

Q. I hand you a box containing a group of folders. What folders are these, for what weeks?

A. They cover the period from December 1948 to week ending October 15, 1949. I think in that box there, [86] that particular box there, is from December 25th. I believe some earlier folders for December are around here.

Q. I hand you another box and ask you what is in there?

A. This particular box contains the folders for weeks ending November 5, 1949 to May 13, 1950.

Q. I hand you still a third box of folders, and ask you what that contains?

A. That covers the period for week ending May 20, 1950 to September 9, 1950.

Q. Mr. Smith, with the folders in the three boxes just shown you, can the weekly product analysis sheets for the 17 weeks period ending October 22, 1949, the 48 week period ending September 9, 1950 be checked and verified?

A. Yes sir, they can, with those folders, with the addition of the live stock summary book.

Q. That was the charge sheets that—

A. That is correct.

Q. So, from the folders in the three boxes, plus the live stock summary sheet, Plaintiff's Exhibit 1-A, all of the fig-

ures in the weekly product analysis sheets in Exhibits 2 and 4, can be verified and checked?

A. That is correct.

MR. GOLDMAN: Mr. Pickrel mentions there are several of these sheets missing. Do you know offhand which [87] ones? We will look for them.

MR. PICKREL: No, I don't.

MR. GOLDMAN: We will look over them and if we find any missing we will supply them.

Q. Now, Mr. Smith, from your weekly product analysis sheets, taking a sample from Plaintiff's Exhibit 2, the week ending December 4, 1948, does that sheet tell you where all of the parts of the pork carcasses that were the result of the slaughter during that week, went to?

A. Yes, sir, it does.

MR. PICKREL: That is part of Exhibit 2, isn't it?

MR. GOLDMAN: Yes, that is part of Exhibit 2.

Q. Now, I wonder if, for illustration and better understanding of what we are talking about, Mr. Smith, I wonder if you would come over to the board. Keep your voice up so the reporter can hear you and the Court and jury can hear you. Indicate on the board the manner in which the product analysis sheet shows what disposal is made of the hog carcass.

A. (witness does as requested by counsel.) We start with the dressed hog. Some of these hogs are sold as whole carcasses, so we will deduct those, and the balance is cut up. Those that we cut up the following day into hams, loins, shoulders, picnics—

Q. Will you describe what a picnic is?

[88] A. Picnics is from the shoulder of the hogs to the front part where the joint is and then going back to the plate, that is the Boston butt. This shoulder includes both of these cuts. Sometimes they are sold fresh as shoulders

and sometimes they are further cut up into picnics and Boston butts, the picnics going to smoke and the Boston butts being sold as a fresh item. Bellies, trimmings and fats.

MR. PICKREL: No bacon?

THE WITNESS: That is belly. The trade name for that in the trade is bellies. After it is smoked it becomes bacon.

Of the dressed carcass, the hams are approximately 18 percent; the loins 13 percent. 4 percent will go into shoulders; 6 percent into picnics; 5 percent into Boston butts; 15 percent into bellies; 7 percent into trimmings; fat will be 22 percent, and then miscellaneous cuts there are approximately 10 percent. The miscellaneous cuts consists of jowls, feet, spareribs, neck boner and tails.

MR. PICKREL: Boston butts is all one thing?

THE WITNESS: Yes.

A (continued) All right. Now, after the cut, certain of the product is disposed of immediately, that goes to sausage, lard and inedible; that is a by-product.

Q. When you refer to inedible—

[89] A. Something not for human consumption. And we render it, inedible product, as grease.

MR. PICKREL: Where did you say those last three things came from?

MR. GOLDMAN: Inedibles.

MR. PICKREL: Sausage, lard and inedibles, what do they come from?

THE WITNESS: Well, I will try to show you. The trimmings here will be transferred to the sausage department.

MR. PICKREL: Well, do they come from the trimmings?

THE WITNESS: That's right. As they produce these various cuts, for instance, the belly comes out of a hog, it

is rough. It has to be trimmed up. That is known as trimmings. Same thing is true of shoulder, it is rough cut. When they are trimming off the ham, they are called "ham trimmings".

MR. PICKREL: Those three things that you wrote up there, sausage, lard and inedibles, they all come from the trimmings?

THE WITNESS: No.

MR. GOLDMAN: He will explain it, Mr. Pickrel, and if you are not clear when he is finished, I will suggest you wait until your cross-examination to ask the questions.

MR. PICKREL: I would like to know.

Q. You explain from what parts the sausage [90] comes from.

A. 7 percent of the dressed weight is transferred to the sausage department as trimmings used in the further manufacture of sausage. The fats, which amounts to 22 percent, are transferred to lard department for rendering into lard.

MR. PICKREL: All of them?

THE WITNESS: Yes, sir.

MR. PICKREL: Okay.

A. (continued) Out of this miscellaneous item there is hind feet which approximates 2 percent of the dressed weight that we transfer to inedible.

Q. Mark it "inedible 2 percent".

A. All right (witness does as requested by counsel). We have another department in the processing for smoked. In other words, we take this fresh meat in its original state and cure it and process it to smoked, of that we will take 16 pounds a hundred, or 16 percent of ham.

MR. PICKREL: Of what?

THE WITNESS: 16 percent of the dressed weight of the hog will be hams for smoking.

MR. PICKREL: Of the whole—

THE WITNESS: On the picnics 5 percent of the whole hog will be used for smoking, to make smoked picnics out of them. The bellies, they will go practically entirely [91] for smoking, which is 15 percent. This miscellaneous item, there will be jowls, which is 2 percent of the hog, for further processing ultimately to be smoked. That leaves the balance of that product as available for fresh sale. That would be 2 percent of the hams. In other words, the majority of the hams that are produced are further processed for smoked hams, but there is a small percentage that is sold for fresh ham. The loins, practically entirely for fresh sale. Shoulders, they are entirely for fresh sale. There is 1 percent of the picnics, or 1 percent of the dressed hog in picnics, that is available for fresh sale. Boston butts are all for fresh sale. On this miscellaneous item, here that leaves about 6 percent that would be part of the feet, spareribs and the neck bone. Now, if I total these up, it totals up to a hundred percent. That is the approximate distribution of the hog as it is cut up through our plant.

MR. PICKREL: Now, wait a minute, please. What is that 31 percent?

THE WITNESS: That is the total of these.

MR. PICKREL: Is that the smoked?

THE WITNESS: There is two 31 percents here.

MR. PICKREL: Well, what is the first one?

THE WITNESS: The first one consists of 7 pounds of trimmings.

[92] MR. PICKREL: Was it generally—is it smoked or sausage?

MR. GOLDMAN: He says it consists of several items. If you will let Mr. Smith tell you what it is, I think you will understand it.

THE WITNESS: That 31 percent is made up of 7 percent trimmings, 22 percent fat that goes to lard, and 2 per-

cent of miscellaneous items, jowls that are skinned for sausage. No, wait a minute. .2 percent is hind feet and stuff that goes to the inedible tank.

Q. In other words, 7 percent goes to sausage, 22 to lard and 2 percent to inedibles of the first 31 percent?

A. That is right.

MR. PICKREL: 7 percent is sausage.

MR. GOLDMAN: 22 percent lard, 2 percent inedible.

THE WITNESS: I meant that 7 percent trimmings for sausage. It is not sausage. Sausage is a finished product. This is a raw product going into the manufacture of sausage.

MR. PICKREL: It eventually gets into sausage?

THE WITNESS: It becomes sausage when it is completely processed.

MR. PICKREL: Now, the next 38—what is the 38? That is all smoked stuff, isn't it?

THE WITNESS: No. That is product being [93] processed for smoking. It is not smoked in that state.

MR. PICKREL: But that is where it is—

THE WITNESS: It naturally will wind into smoked, yes.

MR. PICKREL: All right. And the other 31, is there any name for that?

THE WITNESS: Yes. That consists of hams, loins, shoulders, picnics, Boston butts. Then the miscellaneous small items, spareribs, neck bones, and so forth, for fresh sale.

MR. PICKREL: Sold as is, without anything done to it. Is that right?

THE WITNESS: That is correct.

MR. PICKREL: That is all I want to know.

Q. That would be called "fresh pork"?

A. That is right.

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Testimony of Mr. A. O. Paul

DIRECT EXAMINATION

[94] Q. What is your name?

A. A. O. Paul.

Q. What is your address?

A. 702 Wilfred Avenue, Dayton, Ohio.

Q. What official position do you hold in Montgomery County?

A. Clerk, Common Pleas Court.

Q. And as such, are records of criminal convictions in your custody and care?

A. They are.

MR. PICKREL: Now, pardon me. I think I know what you are after and I should like to see these papers before you get into them.

MR. GOLDMAN: I have no objection to counsel looking at the papers. They are public records anyhow.

Q. (after Mr. Pickrel had looked at the papers.) I hand you, Mr. Paul, two papers and I will ask you if those two papers are among the papers in criminal cases under your jurisdiction as Clerk of the Courts of Montgomery County?

A. They are.

MR. SELVA: We object to these papers, [95] individually and generally as it does not constitute a part of the plaintiff's claim and the papers are otherwise incompetent.

THE COURT: Let me see them. Mr. Paul (after the Court had examined the papers.) May I see counsel at the bench, please?

(Counsel enter with the Court at the bench, out of the hearing of the jury.)

THE COURT: I will overrule the objection.

MR. SELVA: Exception.

MR. GOLDMAN: What was the question, please? (thereupon the last Q. was read by the reporter.)

Q. To what individual do those papers refer?

A. William Harris and James Jackson.

MR. GOLDMAN: I would like to offer these in evidence, your Honor, with the privilege of substituting copies so the original records may be returned to the Clerk's office.

MR. PICKREL: What is the paper, a letter or an indictment or an affidavit?

Q. Will you describe what the papers are, please, Mr. Paul?

A. This is an indictment by the Grand Jury, filed November 21, 1950, in the Clerk's office against William Harris and James Jackson.

[96] Q. What is the other paper, Mr. Paul?

A. The other paper is an entry which was filed in which James Jackson plead guilty to grand larceny.

THE COURT: They may be offered in evidence with the privilege of substituting copies after the case is over.

MR. SELVA: Note our exception, please.

THE COURT: The Clerk has certified copies of those two documents. Is it satisfactory with counsel that the certified copies be substituted now?

MR. GOLDMAN: That is perfectly agreeable, your Honor.

MR. SELVA: Yes.

* * *

Testimony of Kenneth Smith

DIRECT EXAMINATION (Continued)

[99] Q. In the final column, out for sale 31 percent, the items of the fresh pork remaining of the hog carcass, which are held for sale; is that correct?

A. That is right.

[100] Q. In your weekly product analysis sheet are the disposition of the various portions of the carcasses by weight shown with respect to transfers to lard, to inedible, for processing, for smoked?

A. That is right.

Q. And for sausage?

A. That is correct.

Q. And can you tell by subtracting the amounts by actual weight which have been transferred to other departments from the original weight, the amount that you should have left?

MR. PICKREL: To which we object as to whether he can or not. Did he?

A. Yes sir. The sheets analyze the operation in that form. We start off with our dressed hog's carcass and we show everything we take away from that for further processing and the remainder is what is left as fresh sale. These figures I have shown here are the approximate figures. The weekly sheet show the exact figures, what was done.

Q. Those figures on those sheets, the figures of reported actual weights?

A. Yes they are.

MR. GOLDMAN: You may resume the stand.

(The witness does as suggested by counsel.)

Q. I believe yesterday, Mr. Smith, that you [101] stated that in your computations you figured a certain amount for natural or normal shrink?

A. That is correct.

Q. I believe you testified about that?

A. Yes, sir.

Q. And, in your experience, what is the amount of normal or natural shrink to which fresh pork would be subjected?

MR. SELVA: We object to that unless he describes the factors under which he has determined that, whether or not that is determined at Sucher's, Swifts or Armours.

Q. Confining yourself from your experience at Sucher's.

A. At Sucher's we have made several tests to determine — that is, from time-to-time, to determine what our cooler shrinkage is, and the way we conducted those tests was to weigh the hogs at the time they went into the cooler. The same hogs were reweighed just before cutting to see — to determine how much the hogs shrunk in the cooler and the average shrinkage there would be approximately one and three-quarters percent.

Q. When was your experience accumulated at Sucher's?

A. My experience was accumulated during the last seven years.

[102] Q. Now, Mr. Smith, is there any additional shrinkage due to natural causes after the cutting — the processing, rather?

A. Yes. During the processing and cutting there is small shrinkages, bone dust and, oh, maybe miscellaneous items that might drop on the floor, a piece of fat, or something stick to the man's knife when he cleans it up, and that runs approximately one-fourth of 1 percent.

Q. Is there any additional shrinkage after it is cut prior to the time it is weighed for sale?

A. Yes. There will be shrinkage. Of course we do everything to prevent that.

MR. PICKREL: Now, please, —

Q. Just tell us how much shrinkage you experienced from your observations, and tests, at Sucher's through the natural means?

A. The normal and natural shrinkage should not exceed 3 percent, which we originally allowed in our tests.

MR. PICKREL: Now, pardon me.

Q. I am now talking, Mr. Smith, about the – not the total shrinkage, but the shrinkage, after – if there is any shrinkage after the animal is cut up and after it has had the cooler shrinkage and the quarter percent, which you say will occur in the actual cutting process.

A. Well, that leaves 1 percent of the carcass [103] weight. However, a number of the items are almost immediately weighed, in a very relative short time, so the shrinkage on those items, as far as fresh pork is concerned, stops at that time. And although it has 1 percent remaining shrinkage on the pork available for sale, would be a larger amount, because some of those items you weigh almost immediately and, of course, there is no further shrinkage as far as the pork department is concerned on those items.

Q. I asked you the items that are weighed immediately after the cutting. Take the total shrink on those would be one and three-quarters percent plus a quarter percent, or a total of 2 percent.

A. That is right.

Q. As to those items that are not weighed immediately, what proportion of the total are those?

A. Well, that would be in the neighborhood of 3 percent on the items remaining.

Q. You don't understand me, Mr. Smith. I am not talking about the amount of shrinkage you allowed in the claim. I am now talking about in actual experience what percentage of the total amount of the fresh pork for sale is not weighed immediately. I am talking about the shrink

now. I am talking about the percentage of total fresh pork available for sale.

[104] A. That would be approximately — answering one question, the fresh pork available for sale would amount to approximately 30 percent.

Q. Now, you say some of that is weighed immediately.

A. No, not of that part available for sale.

Q. I see. The other items are weighed and transferred — the parts weighed immediately are the parts transferred to the other departments?

A. That is correct.

Q. And approximately 30 percent then is not weighed immediately, but weighed at the time of sale?

A. That is correct.

Q. Well, how much shrinkage occurs as to the part that is held for sale between the time of cutting and selling?

A. Oh, there would possibly be 1 percent.

[105] Q. The shrinkages, to which you have been testifying, Mr. Smith, are those the shrink that you actually experienced at Sucher's?

A. That is correct.

Q. Now, with respect to smoked pork, when was, during the period in question, the smoked pork weighed?

A. The smoked pork was weighed when the smoking process was completed.

Q. Did you say when the smoked process was completed.

A. That is right.

Q. Was that weight recorded in your product analysis sheets?

A. Yes, sir. That is the weight in the weekly folder.

Q. And when was that product next weighed?

A. Well, that product would next be weighed at the time of sale on invoices.

Q Now, in your experience at Suchet's, what was the normal or natural shrink? I should ask before that, was there a normal or natural shrink in fresh pork between the time smoking is completed and the time of sale?

A You mean from the time smoking is completed until the time of sale?

Q Yes.

A Oh, one and a half to two percent.

* * *

[107] Q Mr. Smith, with respect to sausage, is there a normal or natural shrink that occurs in sausage after it is manufactured before it is sold?

A Yes, there is. The sausage is weighed right [108] out of the process in bulk quantities, and then when that is repackaged into small 10 and 6 pound units, 1 pound units, there is a shrinkage in both the weighing and normal shrinkage.

Q Is the sales weight the same as the latter weight that you describe?

A Yes. The next weighing on the smoked meat would be the sales weight. That is, other than the weighing of the individual packages, such as 1 pound packages, 6 pound packages or 10 pound packages.

Q You said smoked meats. Did you mean sausage?

A I was thinking of smoked sausage.

Q And in your experience, what is the amount of normal or natural shrink between the weight of the sausage after it is produced and the time that it is sold?

A On smoked sausage, it would be about 4 to 5 percent, and on fresh sausage about 2 percent.

Q In attempting to compute if there is any difference between the total weight of the product that is left after giving due credits that you have mentioned and allowing

for its natural shrink, can you tell us accurately in any one particular week from your product analysis sheets?

A No, you cannot tell it accurately in any one week on our product analysis reports. The reason for that is that the inventories in a number of cases are approximated. It [109] would be too big a job to actually weight your inventory each Saturday because these departments are operating, some finish early, some finish late, some won't work at all, so other than our fiscal closing inventory, when we have the auditors come in, the inventories are to a large extent approximated.

Q Is will inventory more accurately at the end of the month than weekly inventory.

MR. PICKREL: We object.

THE COURT: I will overrule the objection.

MR. PICKREL: Exception.

MR. GOLDMAN: What is your answer?

A Getting back to the original question, are the figures accurate, of course, you are going to get a more accurate picture the greater number of weeks you take into consideration, because that is a plant there that is operating at 24 hours a day. I have stated that a big part of the inventories are approximate weights due to the nature of the business. You have to close down to get an exact inventory. Also, it is possible somebody might take an inventory in the sales department, take some of that product and ship it out, you could have a duplication there. But this duplication in one week would be offset the following week. For instance, if that inventory – you use the same each week – your closing inventory is the opening inventory for the [110] following week. As I mentioned, any sales, if they don't go through one week, they go through the following week. Taking an accumulation of a number of weeks, you get a very accurate picture.

Q In other words, if there are any errors in approximation of an inventory each week will get washed out over a period of time?

A That is right, because you are using the same inventory to start your operations as what you end your operations with. In other words, take a month operation, take the inventory the first week, second, third and fourth, if you were figuring that month and totalled these two inventories in here, and the middle wouldn't mean a thing, because you wouldn't use them. You take the total production for the month, your sales for the month and these interim inventories would have no effect whatever upon your final result.

* * *

CROSS EXAMINATION

161 Q You say all the pieces that go through the cutting room shrink 1/4 of 1 percent as the result of all these operations that you detailed, is that right?

A Yes, that's right. I said approximately a quarter of 1 percent. It might be a little less one day and maybe a little higher one day.

Q Do you have any ratio of quarter of 1 percent to a half percent?

A I think if I was taking the average, I would say about a quarter of 1 percent.

Q You think it would be about a quarter?

A Yes, sir.

Q And that quarter of 1 percent would be what you call cutting shrink?

A That quarter of 1 percent we don't call anything. I would just like to go back a little bit to bring out how this comes up. When we weigh our hogs, they go over [illegible] a scale we deduct 1 percent. That 1 percent takes care of the

initial cooler shrink, the cutting shrink and all subsequent shrinkages.

Q. Well, that may be, but you just told us a while ago that those figures on the white sheet included a 3 percent shrink, and they had not been cut up at all.

A. You asked me about those figures on that sheet so many different times. We take the original weight. We weigh just before it goes into the cooler. We accumulate those weights from the tape which comes off the scale. From that we deduct 3 percent. That 3 percent takes care of the cooler shrink, the cutting shrink, and is more than adequate to take care of any additional shrink.

Q. You think 3 percent covers the hog from the beginning clear through until it is sold?

A. Yes.

* * *

[164] A. That claim is -- the heading on that column says it was carcass weight processed. That carcass weight that is processed through the killing, from which many hogs were sold as hog carcasses. Therefore, 31 percent of that weight would not be fresh pork that was sold. There is many hogs that were sold in the dressed carcass form, or many carcasses of hogs sold.

Q. Sold as fresh pork.

* * *

[188] MR. GOLDMAN: May I again suggest these be admitted in evidence now. The admission was reserved on Exhibits 2 and 4. I assume there is no objection to admitting them in evidence.

THE COURT: They may be admitted.

MR. GOLDMAN: That is, 2 and 4.

THE COURT: They are admitted.

Thereupon the exhibits previously marked for identification Plaintiff's Exhibits 2 and 4, respectively, were admitted in evidence as **Plaintiff's Exhibits 2 and 4.**

* * *

199 Q In other words, if the foreman and the clerk made a mistake on July 4th, they would not make any mistake on July 11th, would they?

A If they forgot the whole inventory July 11th, on the basis of the claim, it would not make any difference, because on the week July 2nd, on the following week, July 8th, you would start out with the same inventory of the prior week, which would be July 11th, and one would cancel the other out. And as far as the claim is concerned the intervening inventories have no effect upon it, whether they [200] were accurate or inaccurate, because this claim is prepared on a cumulative basis.

Q So that your foreman and your clerk, if they made a mistake on one inventory, they never make it on another, is that your argument?

A No, I didn't say that. As far as the coordinate concerned, one would adjust itself.

Q All right. Now, the second period starts with your October inventory, that is, it starts November 5, 1949 and ends September 30, 1950. So in that period you had no actual inventory by count, did you?

A The two inventories involved were approximate inventories.

Q What two inventories?

A The opening and the closing would be the only inventories that would affect those figures.

Q And all in between were approximate?

A But they would have no affect upon the figures.

Q Well, that is what you say. But they were all approximate inventories. In other words, the man in charge -- you had a foreman in charge of your smoked ham department.

A What I am trying to point out, although one of those inventories, or the inventory might be approximated, [20] an error or misapproximation in one week will offset itself the following week. So the only two inventories that would be involved would be the one at the beginning period and the other at the end of the period.

[204] Q At or about that time, shortly thereafter you were informed that apparently there was a good bit of stealing or pilfering around the plant. Nothing particular, just informed of it generally.

A That's right. In a discussion of the business there that point was brought up on several occasions.

Q And you heard about it from time to time thereafter.

A Yes, sir.

Q I believe a man by the name of Arthur Beerman is president of your company.

A Yes, sir.

Q Did you ever hear of him sleeping out there at night trying to catch these burglars?

A Yes, sir.

Q Did you ever sleep out there at night, trying to catch the burglars?

A I have spent a lot of night hours there, but I never stayed there through the entire night. He came there very odd hours.

[205] Q In other words, while you were there catching burglars you did not sleep there, but you did spend

MR. GOLDMAN: Technical distinction. It is not claimed they were burglars.

[209] Q. You heard Mr. Beerman say he was being stolen blind, didn't you? Wasn't that a favorite expression of his, "They are stealing us blind"? Did you ever hear him say that?

A. I have heard words to that effect, whether those were the exact words, I don't know.

Q. And Willie Harris was a boy that was doing it, wasn't he?

MR. GOLDMAN: I object.

THE COURT: Sustain the objection.

Q. Do you know of anybody else that was doing it beside Willie?

A. Yes, I know there was other people, those [210] confessions, and I know from time to time we have caught various individuals taking a ham and so forth, and we would immediately fire them and make them known, for what reason they were being fired.

Q. You got that record?

A. Beg your pardon?

Q. Do you have that record?

A. No.

Q. You don't?

No.

Q. You don't have any record there of anybody caught stealing a ham or anything else?

A. I imagine our employment record would be marked by personnel, the employee was fired for stealing, whatever the cause might be.

Q. You didn't catch anybody yourself?

A. No, I never did catch anyone.

Q. Ever talk to anybody that was charged with stealing?

A I would say more than likely I did.

Q Do dou remember? I am not asking you to guess.

A They catch a man and he is fired for stealing and he works in the plant, I think at some time or other. I probably said "good morning" to everybody there.

[211] Q You know that ain't what I am talking about. Anybody caught stealing any of your pork products, did you ever talk with him when he was charged with that theft?

A No, regarding the theft, I don't believe we did. We usually turned them over to the person in charge. Some occasions they called the detective agency out for further questioning and trying to determine the extent.

Q You were trying all the time to find the various ways they were getting stuff out of that plant. You put bars on the windows. You changed the doors. You changed the locks. You changed the fence. You hired more guards. But you don't remember ever talking to anyone about how he stole something out of that plant, is that right?

A No, I did not specifically talk to them.

Q All right. But there was a lot of it going on, you say in your opinion. You don't know, but that's your opinion?

A That is correct.

. . .

[223] Q In other words, the records were kept approximately the amount that went into cure of each of these various articles?

A No, the amount is accurate. A vat holds a certain amount and they fill up that vat and that is it.

Q When you say there were 1600 pounds of bacon, that is an approximate figure?

[224] A It could be 1595 or 1605, something like that.

Q. It couldn't be 1625 or 1585, or might it be? Or do you know?

A. It will be very close, and they will come out to the average of that weight.

• • •

[232] Thereupon said document containing supporting data for the product analysis sheet for the week ending December 17, 1949 was admitted in evidence as **Plaintiff's Exhibit No. 3.**

• • •

[245] Q. And if these figures on your weekly sheets are inaccurate, either because hams were moved in round figure weight, or inventories were taken in bracket weights, which was not exact, and if your weekly sheets, therefore, are inaccurate, then that inaccuracy would carry forward into the claim filed by the accountant?

A. In the inaccuracies on the inventory would have no affect on the total.

Q. I am no accountant, but if your inventory is high, you said a while ago—you said if your inventory was $500 higher your loss would be $100 less.

A. Yes.

[246] Q. So, inventories do have something to do with your losses and gains?

A. No, not on a cumulative basis, because, as I said before, if it was understated one week, it would be understated the following week and they would pick up that amount either through sales and reinventory and one error would offset the other and it would have no affect on the total figure.

Q I can't follow you.

A No. You are using the same figure. One week it is treated as a credit and the next week as a debit.

Q But those weeks end. I know you start with the same thing you left off with the previous week, and then you have another ending.

A Yes.

Q Now, that ending is incorrect, and it is carried onto this weekly sheet that you have in your hand, which I have taken from Plaintiff's Exhibit 2, dated December 17, 1949. All right. Now, it is from those weekly sheets which show underage and overage that your accountant has computed the bill that he has presented to the defendant and I think you said that is right.

MR. GOLDMAN: I think, your Honor, that is a mistake. The accountant has presented no bill to the defendant.

247 MR. PICKREL: Don't get technical.

MR. GOLDMAN: The accountant has prepared a statement on which the plaintiff has made a claim.

Q The accountant made the statement on which your counsel has filed a law suit. The accountant's statement is based on the figures on this weekly report, one of which you have in your hand, is that right?

A That's right.

Q And it – catch the – if I wouldn't accuse you here of making a mistake. But if the inventory is correct or is approximate or is average – that would then affect one year or the other, your shrink or gain in the column on that weekly statement.

A You start with the – it would affect for that particular week. It would have no effect on the claim. If this was left out entirely, the inventories were left out entirely, the claim would be no different than what it is now, be-

the product would be there, so there would be tremendous gains. So you take the two weeks together and one offsets the other and it has no basis in the accumulation of figures as far as the weekly inventory.

Q. Then you think the fact that the hams are considered in weight, on a classification basis of anywhere from 6 to 30 pounds and the bacon anywhere from 6 to 20 pounds that has no significance at all?

A. No.

Q. None at all?

A. No.

Q. And the mere fact that they went into cure in round figures, so many, that has no significance?

A. No, no particular significance.

Q. No particular significance.

A. The vat might weigh 1395 one time, 1405 next time. It has no particular significance.

• • •

[259] Q. Those mistakes could be caused by inventory errors?

A. Yes, which washed themselves out. Or possibly sale going through in a wrong week, as I think I [260] stated before, when the inventory is taken, operation still going on, and some particular time a person might ship out some product which has already been inventoried, and there would be a double credit to this department, and that would offset itself the next week, because the sale went through the wrong week would affect the weekly results. But inasmuch as it was included in the period there would no effect on the 1947 or 1948 period results.

• • •

[264] Q. Now, I hand you one of my calculations just to save you the trouble. All you have to do is add it. The fresh pork sold during the first period was 3,970,944 pounds?

A. Yes.

Q The smoked pork sold was 2,683,782 pounds.

A Yes.

Q And the sausage sold, total sausage was 2,237,842 pounds.

A Yes.

Q Now, will you add those and see if my addition is correct there?

A (witness does as requested by counsel) Yes, your addition is correct.

Q Now you deduct that total amount –

THE COURT Excuse me. Were you using the word "sold" or "stole"?

[265] MR. PICKREL. Sold.

Q Now, deducting that total amount for those three items and the total amount is for those three items 8,892,624 pounds, is that correct?

A That is correct.

Q Now, we deduct that from the first figure of 9,758,443, which is the fresh pork total?

A Yes.

Q And what is the difference?

MR. GOLDMAN I object, your Honor. It is completely immaterial, has no bearing on the matter at all. They are not related items.

MR. PICKREL. We will see.

THE COURT I think he should have an opportunity to explore it.

Q How much is unaccounted for?

A I have just been studying your figures. I don't know why you are picking up these figures. You start out with a pork figure and then you talk about an item which also has beef in it. Sausage also has beef in it.

Q I don't know what you got in the sausage. I am giving you full credit for all the dollars you had in the

dressage [illegible] it had the kitchen sink in it. How much is unaccounted for between what we are charged with and what we are credited with, how many hundreds of thousands of dollars?

266 A. I can't answer that question from these figures because everything you were charged with you were credited with. You are trying to add apples and oranges here.

Q. No. I am adding no apples and oranges in this. These are all dollars.

A. As shown here are all dollars, but you are picking out a figure trying to draw a conclusion that is not correct.

Q. Let's argue about that later. Let's get the figures first.

A. The figures that you have on your sheet here show [illegible] but I said before that don't seem to mean anything.

Q. To you they don't mean a thing. Your charge is [illegible] 7,000,000 dollars.

A. I don't believe you are correctly stating the question. [illegible] if you were to examine those sheets, you would find that the pork department is credited with everything from those records. Everything can be reconciled except [illegible] disappeared, and I am not going to ask you to take [illegible] or ask me to make a conclusion of them.

. . .

REDIRECT EXAMINATION OF KENNETH SMITH

. . .

Q. Where is the disposition of the extra 9,758,11[illegible] pounds of carcass weight processed fresh pork shown [illegible] is shown on there?

A. The disposition of that weight is shown on our pro[illegible] Cutlets report for a product we were able to account [illegible] some shrinkages we cannot account for.

Q. Do you know of any explanation for the [illegible] that cannot be accounted for —

MR. SELVA: We object.

Q. Continued — ascribable to conduct in the course of business.

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Have to proffer an answer, if your Honor please.

Out of the hearing of the jury.

The answer proffered is "no."

In the hearing of the jury.

Q. Mr. Smith, this reference to the smoked pork item total of 2,083,782 pounds, shown on the same sheet which we have been talking about as sales, will you describe there that smoked pork came from?

A. Smoked pork would be transferred from the curing department.

Q. And prior to that, where did it come from?

A. From the hogs which we cut.

Q. And is the amount which is transferred to the curing department shown on the product analysis sheets?

A. Yes, that is shown as a credit to the fresh pork.

Q. Is there any portion of the sausage item shown on the same sheets—

MR. SELVA: We object, if the Court please. The exhibits speak for themselves. That was Mr. Gould's reason.

MR. GOLDMAN: I haven't finished the question, your Honor.

THE COURT: I will overrule the objection.

Q. —continued — which originates from fresh pork?

MR. SELVA: Now we will object. The exhibits speak for themselves.

MR. GOLDMAN: Mr. Pickrel asked him what became of various things and I am attempting to bring out from the witness where those things are shown.

THE COURT: I will overrule the objection.

THE WITNESS: I have forgotten the question now.

(Thereupon the last Q. was read by the reporter.)

A. Yes, part of the items shown on the sheet originate from fresh pork and also part of them are beef and other –

Q. As to the portion which originates from fresh pork is that also shown on the product analysis sheets?

A. Yes, that is shown on the product analysis sheets as a credit to the hog which was cut up.

Q. Is the amount that comes from the fresh pork to [illegible] lard, which you mentioned, shown on the product analysis sheets?

A. Yes, sir, it is.

Q. Is the amount that comes from fresh pork to tankage shown on the product analysis sheets?

A. Yes. In that case there are two parts, those on the cleaning, parts that come off on the killing floor, there is a money credit, and anything comes off after the carcass is cut.

Q. The carcass weight processed pounds is 9,798,143. Is the portion that goes into tankage shown on the product analysis sheets?

A. Yes, sir, it is.

Q. Is the same thing true with respect to these various items as to the 17,069,507 pounds shown for the period ending 1950?

A. Yes, sir.

Testimony of Julian A. Hawk

DIRECT EXAMINATION

[283] Q Will you please state your full name?

A Julian A Hawk

Q What is your address, Mr Hawk?

A My business address?

Q Yes, sir.

[284] A 1127 Third National Building, Dayton, Ohio

Q What is your business?

A Certified Public Accountant

Q How long have you been a certified public accountant?

A Since 1928

Q You have been actively engaged in the business of public accounting since that time?

A Yes, sir.

Q With what firm are you connected?

A Arnold, Hawk & Cuthbertson.

Q Are you a partner in that firm?

A I am

Q In your practice of the profession of public accounting, have you had occasion to audit and do accounting for firms in and around Dayton?

A Yes, sir.

Q In that period of time you have been engaged in that profession?

A Yes, sir

Q I will ask you if your firm are auditors for the Sucher Packing Company?

A We are.

Q How long have you been auditors for the Sucher Packing Company?

[285] A Since 1948

MR. GOLDMAN: Mark this please. Plaintiff's Exhibit

Thereupon a document was marked for identification as **Plaintiff's Exhibit No. 6.**

Q. Mr. Hawk, I hand you a document which has been marked for identification as Plaintiff's Exhibit 6, and ask you if the original of this document was prepared under your supervision and direction?

A. Yes, sir.

Q. What is that document?

A. A computation titled "Computation of excess shrinkage and resulting unexplained loss, Stuchei Packing Company."

Q. Now, I hand you a group of documents which has been identified previously as the product analysis sheets of the Stuchei Packing Company for the 17 weeks period ending October 22, 1949 and for a 45 week period ending September 9, 1950, and I will ask you — and these documents have been previously identified as Plaintiff's Exhibits 2 and 3. I will ask you if there is any relation between the documents in my hand, these product analysis sheets, and the document in your hand?

A. This is a summary prepared from those product analysis sheets.

286 MR. GOLDMAN: Like to offer it in evidence, your Honor.

THE COURT: It may be admitted.

Thereupon said computation was admitted in evidence as **Plaintiff's Exhibit No. 6.**

. . .

THE COURT: I am inclined to believe that no person who did prepare it. Mr. Hadley [illegible]

[illegible] should identify and testify to it. I will sustain the objection of the defense to the introduction.

[illegible]

297 Q. Mr. Hawk, this question I am about to ask you has reference to general accounting principles. If you assume a situation, Mr. Hawk, where you take a series of inventories and series of records of the disposition of a 298 product, not confining it to this case, but in general, week after week, and the opening inventory of one week the same figures are used for the closing inventories of the preceding week, does it make any difference, is any error introduced insofar as errors in inventories may creep in with respect to any of the intermediate inventories other than the beginning and ending inventory of the entire period?

MR. SELVA. We object.

THE COURT. Overrule the objection.

A. I think it would not make any difference inasmuch as those errors would be counter-balancing if they exist.

Q. If, for example, in one week the inventory was so grossly misstated it would be eliminated entirely, and that was an intermediate week, would that introduce an error to the matter on the assumption that each week began with the closing inventory of the preceding week?

MR. SELVA. We object.

THE COURT. Overrule the objection.

A. No, it would not make any difference because—and at the next week with no inventory and any error in that one would be offset by the error in the next one.

Q. Now, Mr. Hawk, assuming again as a general case, not this specific case, but a general case, where one is attempting to determine whether or not there is an 299 inventory, whether there is anything missing, if a flow

of product in the neighborhood of between nine and ten million pounds goes through the hypothetical plant over an extended period of time, and assume that there could be some error in the opening and closing inventories, that is the first inventory of the period and the last inventory of the period, and assume that those inventories are in the neighborhood of — somewhere between 30 to 45 thousand, in that vicinity, would the errors, possible errors, in the opening and closing inventories materially affect the computation of what product is missing?

MR. SELVA: Object.

THE COURT: I take it you would assume in there that also all the intervening inventories were correct?

MR. GOLDMAN: No, your Honor. The assumption there is, the first statement has been that no errors in intervening inventories would make any difference.

Q. Now, assuming the opening and closing inventories have been washed out, assuming there would be possible error in those and assuming that the flow of product in the long period of time is in the neighborhood of nine million pounds as compared with opening and closing inventories in the neighborhood of 30 to 45 thousand pounds.

THE COURT: Just a minute. I don't know, Mr. Hawk, I would think you would not be able to answer that [300] question unless you knew that all or a substantial number of the intervening inventories were correct, would you?

THE WITNESS: I have testified, I think, all the intervening would be counter-balancing error.

THE COURT: You were asked questions about intervening errors in inventory. Now, you are asked about an opening inventory being inaccurate and a closing in

ventory being inaccurate. I don't know whether you stated the period of time.

MR. GOLDMAN: I say, take an extended period of time of 45 to 47 weeks.

THE COURT: Now, can you answer that question without knowing something about whether or not the 43 or 44 intervening inventories were correct?

MR. SELVA: We wish to object to the question. I don't know whether the record shows it.

THE WITNESS: I think I could answer that.

THE COURT: All right. Overrule the objection.

A. Inasmuch as the intervening inventories would be counter-balancing the beginning and ending inventories, only would affect the total result of the entire period. The relation in the opening and closing inventories would be rather small to the total pounds involved in your illustration, so that any error would have to be a very small percentage of the total, it would seem to me.

[391] Q. Did I understand you to say that the error —

THE COURT: Don't repeat the answer.

MR. GOLDMAN: The answer isn't quite clear to me. I heard the words but the meaning is not quite clear.

THE COURT: Let him state. Don't summarize it.

Q. I will ask you the question this way: Do possible errors in the opening and closing inventory, in the hypothetical case, have any material effect on the determination of the computation of the total missing product during that period?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. I don't think it would have any effect on the computations of the intervening periods. It would only have effect on the first period and the last period.

Q. And based on the volume of product during the — in the proportions I have stated, in your opinion, would the possible errors in open and closing inventories materially affect the results?

MR. SELVA: We object.

THE COURT: I think if you will read back the answer to the question before —

(Thereupon the A. before the last A. was read by the reporter.)

MR. GOLDMAN: I will withdraw my last question.

[302] Q. I gave you an example where the flow of product during the intervening period was in the neighborhood of 9 million pounds. If you will assume a case where the flow of product is in the neighborhood of 17 million pounds, what would your answer be with respect to the effect of possible errors in the opening and closing inventories on the total result?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

A. It would seem to be smaller. It would have to be a smaller percentage on that difference.

Q. If, in computing the distribution of product to proper charges and credits, in the amount you have to start with, are also involved sales and there is possibly sales being charged into a different week from the time they are actually made, and if there is a possibility of having the opening and closing inventories not being exact, over how many — what period of time would be required approximately to have those errors either washed out or become insignificant?

MR. SELVA: To which we object.

THE COURT: Overruled.

A. Well, it would depend upon the size errors, of course, but ordinarily it would seem to me over a period

8, 10, or 12 weeks they would probably balance out pretty [303] well.

* * *

Q. Mr. Hawk, are you familiar with the manner in which the Sucher Packing Company has its controls set up?

A. Yes, in a rather general way.

Q. Are you familiar with the manner in which the product analysis sheets are made up?

MR. SELVA: We object, if the Court please.

[304] THE COURT: Overrule the objection.

A. Yes, again in a rather general way.

Q. You have seen, I believe that you said you have seen the product analysis sheets?

A. I have.

Q. In your opinion, based on your experience as an accountant, do you consider that the manner in which the product analysis sheets are set up is a good form or not good, whatever it might be, form of control to keep track of product?

MR. SELVA: Object.

THE COURT: Sustain the objection. I think the witness rather disqualifies himself. He said "in a general way."

MR. GOLDMAN: He says he is familiar with the sheets; he has seen them.

THE COURT: I think he ought to know more about it than in just a general way.

MR. GOLDMAN: I will put it in a hypothetical form then, your Honor.

Q. If you assume, Mr. Hawk, in the product analysis sheet there is an allowance made to start with for natural shrinkage while the product is in the plant, assume that the sheet provided a place to set forth the amount of the —

take for example a dressed hog – that the sheet [305] provides for the showing of transfers to other departments in the plant, such as sausage department, lard department, curing department, the inedible department, or any other transfer that may be made, and assume further that the sheet provides for the showing of sales made and further that the sheet provides for the showing of the opening and closing inventories, in your opinion, as an experienced accountant of many years, does such a system provide a good control or other than good, whatever your opinion may be, for keeping track of the product?

MR. SELVA: I will object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: I believe that is based on testimony so far, your Honor, I am asking his opinion as an expert whether that is a good system of control.

THE COURT: Well –

(Out of the hearing of the jury.)

MR. GOLDMAN: Note an exception. The answer would be "I consider it to be a very good system of control."

* * *

Testimony of Kenneth Smith

REDIRECT EXAMINATION—(Continued)

[310] Q. Now, of what does so-called cutting shrink consist?

A. The cutting shrink, as I interpret it, is that product you lose during the process of cutting. The only thing you lose would be bone dust, what weight you don't get back when you saw through a bone, or you permit a piece of meat, a little piece of meat, to stick on the knife that could not be salvaged. That is what I consider would be cutting shrink.

Q. If you are processing 400 hogs a day and if the hog weigh – what is the average weight of a hog?

A. Dressed hog may be 160 pounds on the average.

Q Actual experience 160 pounds on the average. [311] ou would have a total of 64,000 pounds of hogs cut a ay, in that 400 a day, is that about right?

A Yes, sir.

Q A quarter of 1 percent of that would be 160 pounds?

A Yes.

Q So that you are allowing 160 pounds in allowing a quarter percent cutting shrinkage for items of bone dust nd pieces that might stick to the knife and things of that sort?

MR. SELVA: We object to Mr. Goldman's statement, nless we have a right to cross-examine him.

THE COURT: I will sustain the objection. Your statement presupposes that he had previously testified to hat, which I think he did.

• • •

[313] Q Mr. Smith, when it appeared from a weekly roduct analysis sheet that excessive shrink appeared on hat sheet, was anything done by the management of the Sucher Packing Company with respect thereto?

[314] MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: What is the ground?

THE COURT: Well, the testimony that would be roper is what was done in any of those instances. The itness testified that he did not know.

MR. GOLDMAN: Certain particular ones he did not remember as such.

THE COURT: What practice. I don't think is competent.

MR. GOLDMAN: All right, I will reframe it further.

Q What was done by the Sucher Packing Company hen excessive shrinks were noted on weekly product-an lysis sheets?

MR. SELVA: We object, if the Court please.

THE COURT: I am sustaining the objection not based on any technical matter that I think rephrasing the question will help. It goes to the very heart of the matter that certain specific instances brought out here the witness did not know what was done in those cases. And you either asked his practice or what was done. I don't think he can answer.

MR. GOLDMAN: I think the point is, he would not remember them by their particular date.

[315] THE COURT: I don't think if he knew what was done in any specific case, he wouldn't know what was done —.

Q. Mr. Smith, let me ask it you know if anything was done at any time that an excess shrink was noted on the weekly product analysis sheets?

MR. SELVA: We wish to apologize for continually objecting. But I must object to this question.

THE COURT: As I have stated, I am not sustaining the objection on the basis of any mere technicality as to how the question is phrased. I think it goes to the heart of it. If you wish to make a proffer of the answer, you may do so.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness if permitted to answer, would say "Yes, I do know".

(In the hearing of the jury.)

Q. What was done in a case that you do remember?

MR. SELVA: Object.

THE COURT: I will sustain the objection.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness if permitted to answer would say that the management checked over all the fig

...es, would keep employees on Saturday and check sales ...d purchases figures, make actual inventories of portions ...the plant

• • •

[317] Q. Mr. Smith, there has been some testimony ...to meat products being taken away in barrels. What ...the weight of meat in a barrel with the assumption as ...stified the meat products were covered with refuse?

MR. SELVA: We object to that, if the Court please, as ...rely speculative, assuming that some of it was covered ...th refuse to be taken out.

THE COURT: Well, I will overrule the objection. ...think he may testify as to the approximate weight of the ...arrel of meat. I suppose that may vary with different ...nds of meat.

Q. (Continued) Referring to the types of barrels that ...ere used to haul away refuse at Sucher's, how much would ...barrel of hams weigh?

A. Oh, hams, a barrel of hams would weigh — [318] ...ay some, maybe between 275 and 325 pounds, in round ...gures. We usually figure about 300 pounds to the bar...el.

Q. What would be the weight of 8 to 10 hams?

A. 8 to 10 hams would weigh, oh, a ham perhaps av...rage about 14 pounds, be a 140 pounds, if it is 10 hams.

Q. And what would 18 to 20 sides of bacon weigh?

A. Figure an average of about 12 pounds a side of bacon, ...0 sides would be 240 pounds.

• • •

Testimony of Abe Solomon

DIRECT EXAMINATION

[341] Q. I hand you, Mr. Solomon, a sheet which is part of Plaintiff's Exhibit 2, headed "Product analysis week ending 1/1/49." Referring to the second page of that, I will ask you if that is a sample of one of the product analysis sheets about which you have just testified?

A. Yes, sir.

* * *

[342] Q. Mr. Solomon, you are familiar with the sheets during the period involved in this controversy. Are they substantially the same?

A. Substantially, yes. The sheets show on one line live hogs. In each case the weight of the live hogs on opening inventory is shown in the first column from the left, and the weight of the live hogs purchased is shown in the second column.

Q. Under the heading "purchases"?

A. Under the heading of purchases.

* * *

[343] THE WITNESS: The next step in the processing of the live hogs was they are slaughtered, at which time the live weight is listed in the "Transfers out" as well as the money and the units, closing inventory, which when added to the kill, will equal the opening inventory and the purchases.

Now, this live weight is transferred to the fresh pork in a reduced figure, because the carcass of the hog does not weigh the same amount as the live hog, and the figures shown as a transfer into dressed pork, represents the weight of the dressed hog immediately after slaughter — the hog carcasses immediately after slaughter, less 3 percent. The

money value in the live hogs is likewise transferred out of the live hog category and it ends up in fresh pork, pork offal, hog casings, or inedible product, accounting for all the money.

At the time the fresh pork classifications move through the plant to ultimate disposition either through sales of the item as fresh pork, or through further processing and on these sheets in the fresh pork category, you will notice that first item, some purchases of fresh pork from outside sources. This is added to the opening inventory [344] of the fresh pork. Then there will be the transfers in, which represent the weight of the hog carcasses that will be the sales which represent that portion of the opening inventory and the purchases and the slaughter for the week, which was sold in the fresh pork state. And then there will be the transfers out which represent that portion of the fresh pork, whether it is opening inventory, purchases or slaughter, which is processed and sent to different departments through the plant, such as the curing department and sausage department, or inedible department.

The summary closes then with the closing inventory which when added to the transfers and the sales, should equal the opening inventory plus the purchases plus the slaughter.

Q. On these sheets after the column of closing inventory, there appears two further columns, shrink, gain and material profit. What are those?

A. The difference between the sales transfers and the closing inventory in one sum and the opening inventory plus the purchases, plus the slaughter, which is the charges represents the money, your profit or your loss. In pounds it represents your shrink or your gain.

Q. Now, you state with respect to cure, hams and smoked hams and sliced bacon – will you state whether

or not the same character of analysis is shown on these sheets.

[345] A Exactly the same.

Q Now Mr. Solomon, in this product analysis, I will ask you whether or not all distribution of meat product that can possibly be shown is shown.

MR. SELVA We object.

A Yes, sir.

MR. GOLDMAN Just a minute. When there is an objection you must wait until it is ruled on.

THE COURT I will sustain the objection. The answer may be stricken and the jury instructed to disregard it.

[346] Q Mr. Solomon, do you recall any occasions when there was a large shrinkage showing up on the product analysis sheets as to what was done about it?

MR. SELVA We object.

THE COURT I will overrule the objection.

A I know there were many instances —

THE COURT The question was —

thereupon the last Q was read by the reporter.

A Yes, I do.

[347] A Yes, I recall not one instance but many, many where we had an amount of shrinkage on smoked hams which was out of proportion.

THE COURT Well, what would you say?

THE WITNESS I don't remember specifically, your Honor. I don't remember the amount. I know, when I say it is out of proportion, it would have been in excess of two or three percent of the amount of the production for that week.

Q. What was done?

A. At that time we were preparing our product analysis records on Saturday afternoon, and the inventory was taken beginning at 11:00 o'clock on Saturday, and as the inventory came into the office it was computed and added for both weight and dollars. And on determining that there was this shrink on the smoked hams, we rechecked all our figures, our figures of production were re-added, we checked them out by re-adding the weights, checking the pieces insofar as we [348] could, and we actually went to the different portions of the plant where smoked hams were kept, and spot-checked the amount on the inventory. I recall one particular instance, this particular instance that we were baffled because we could find –

THE COURT: Not that you are baffled. What did you do?

A. (continued) We continued to check our figures and we re-added all the re-added all the figures that could possibly have any effect on the shrink.

MR. SELVY: We object to the conclusion of the witness. He can state what he did do, but I don't think his conclusion is proper.

THE COURT: Yes. What could possibly have had any effect is not proper. What did you do?

A. (Continued) We recounted the inventory and rechecked all our computations.

[349] Q. Do you have a recollection if there was or was not a practice with respect to what was done in the event a large shrinkage showed up?

A. Yes, sir.

MR. SELVY: We object.

THE COURT: I will overrule the objection.

Q. What was the practice, Mr. Solomon?

A. The practice was to recompute all the figures and to go back to the physical location of the inventory and if on occasion there had been some sales after the taking of the physical inventory, we would take these sales into account by adding them back to the inventory as we found them at the time we took it.

* * *

[352] Q. How long have you been doing auditing and accounting work?

A. 17 years.

Q. Based upon your experience in auditing and accounting, if you would assume that there may be some error — I don't say there is — but on the assumption there may be some error in the weekly inventories, in the two periods mentioned in this case, 47 weeks ending October 22, 1949, and as-reduced, 45 weeks ending September 9, 1950, would any possible error in any of the intermediate inventories make any difference whatever in the computation of the total unexplained loss?

A. They would make no difference whatever.

* * *

[353] Q. Why is that?

A. Because the intermediate inventories would cancel each other. The inventory that was overstated at the end of one period would be understated at the beginning of the following period since it was the same inventory.

Q. And as a matter of actual practice, was the closing inventory one week used at the opening inventory in the following week?

A. In every case.

Q. Now, also based on the relative total flow of product through the plant during the two 47-and 45-week periods

respectively, and the relation of that amount to the opening and closing inventories of the entire periods would – suppose now there might be an error in the opening and closing inventory, would those errors materially affect the result of the computation of the unexplained loss of product for the entire period?

MR. SELVA: Object.

THE COURT: I will overule the objection.

THE WITNESS: Could you repeat the question?

THE COURT: Read the question.

Thereupon the last Q. was read by the reporter.

A. No.

Q. Why is that, Mr. Solomon?

A. Because the total values and quantities of [354] the opening and closing inventories are very, very small fraction of the total product that is involved.

THE COURT: These answers presuppose now that all of the additions to the inventory during the period and the items taken out are correct; isn't that right?

THE WITNESS: Yes.

* * *

Q. Mr. Solomon, there has been some testimony that the employees at the Sucher Packing Company were given a bonus of one third of the profit before taxes.

MR. SELVA: Are we permitted to compare testimony? We object to the form of the question to commence with.

MR. GOLDMAN: I was saying that for the basis of the question, not asking for any comparison.

THE COURT: State your question.

Q. Did the company make any profit in the fiscal year ending October, 1949?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

[355] MR. GOLDMAN: Without meaning any offense to the Court, may I ask whether any profit was made the year following?

THE COURT: You may ask the question.

Q. Was there any profit made for the fiscal year ending 1950?

MR. SELVA: We object.

THE COURT: Sustain the objection.

(Out of the hearing of the jury.)

MR. GOLDMAN: The witness, if permitted to answer would say "no".

(In the hearing of the jury.)

Q. Following the apprehension of the ring, September 1, 1950, did the company make any profit in the following year?

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: That is the last one I am going to ask him.

(Out of the hearing of the jury.)

MR. GOLDMAN: The answer is "yes".

* * *

[356] Q. Mr. Solomon, in the original claim made in this case, the sum of $162,365.34 was claimed and at the present time that claim has been reduced to $149,382.57. Do you have the computations showing the reduction and the reason and what the reduction is based on?

A. Yes, sir.

Q. Would you explain what the reduction comes to and what it consists of?

A. The total reduction is in the amount of $16,394.77. It is due to the elimination from the claim of [357] $9,620.90 on beef and veal.

MR. PICKREL: How much on each, please?

MR. GOLDMAN: They were combined.

MR. PICKREL: I am asking how much on each.

THE WITNESS: I don't have the breakdown with me. I am sure you have it on your desk.

Q. Would you be able to answer Mr. Pickrel's interjection by looking at Plaintiff's Exhibit 6?

A. Yes, sir.

Q. Which is not yet in evidence.

A. That figure was made up of $6,886.46 and that elimination was beef, and $2,734.45 was veal.

MR. PICKREL: May I check? You say beef is $6,886.00?

THE WITNESS: Yes, sir.

MR. PICKREL: What are you going to do about the $1,934.00 up above in the first period?

THE COURT: Suppose we let Mr. Goldman get through.

MR. PICKREL: I am sorry.

Q. What were the other eliminations? You have mentioned the beef and veal elimination.

A. From fresh pork we eliminated $3,591.67.

Q. What does that represent?

A. Which represented a proration of 15/18 [.358] which represented 3/18 or 1/6 of $27,997.04.

Q. Why was that subtracted?

A. The report provided by the Arnold, Hawk & Cuthbertson Company showed the 18 weeks ended September 30, 1950, and the 3/18 or 1/6 was eliminated to come up to the period of the claim which was through September 11, 1950 and a period of three weeks. This amounted to $1,749.81 and the amount deleted from fresh pork. The balance of $1,841.86 was an amount which was taken from the claim to account for meat that was placed in the employee — made available to employees in the cafeteria at lunch

hour which adds up to $3,591.57 eliminated from fresh pork.

Smoked pork we likewise eliminated 1/16 of an original $16,451.17 which represented the three weeks between September 11th and September 30th. On sausage, we –

MR. PICKREL: How much was that smoked pork that you took out?

THE WITNESS: $1,028.19.

MR. PICKREL: That is on account of the three weeks elimination?

THE WITNESS: Yes, sir.

MR. PICKREL: Your next was sausage.

A. (continued) – on sausage, we eliminated $234 from the claim on account of the three weeks, and $1,920 to allow for meat consumed in the employees' [359] cafeteria over the lunch hour. These reductions should add up or do add to $16,394.77, which brings the claim to $146,370.57.

* * *

CROSS EXAMINATION

[381] Q. And when you looked it over to determine this correctness, you did note "Note 1—fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage", didn't you?

A. Yes, sir.

Q. And when you looked it over, did you see anything on there that had anything to do with cutting shrink on this computation?

A. Yes. In looking it over, I took into consideration that the 3% that was listed on the bottom already taken into account plus the ½% which we show as normal shrink would be liberal enough to cover all the possible shrink

in the hog cooler, as well as cooler, cutting room, cutting shrinks and with some there to boot.

* * * *

[398] Q. Well, now, in 1950 were there any hogs sold as dressed hogs?

A. Yes.

Q. There were?

A. Yes.

Q. I think the testimony is that those are not included in here; isn't that right?

A. They certainly are included in there.

Q. They are included?

A. Yes.

Q. Then they go in part to make up this 9,000,000 pounds?

[399] A. Yes, sir.

Q. Do any of these people in this cutting room ever make a mistake?

A. Yes, sir.

Q. And do you have any margin for error that takes place in the cutting room, that occur in any business, that a person can overlook?

A. I think there are other people more qualified to answer that particular question than myself.

Q. You are treasurer of the company, aren't you?

A. That's right.

Q. You have said that mistakes do happen in the cutting room?

A. Yes, miscuts.

Q. As a matter of fact, they happen in any business, don't they?

A. Yes.

Q. And there is always a certain amount recognized in any businesses that margin of error, isn't there?

A. In this particular case, there would be no error. If a man cuts a thing wrong, he does not alter the total weight. If he takes off too much fat, that immediately goes into lard. The excess he takes off of ham would go [400] into lard. So, it would be a different type of error than something that would have to be thrown out.

* * *

[412] Q. Can you tell me what was done when there was an alleged shortage here of 11,616 pounds in April of 1950?

A. I don't recall what we did on that particular [413] date. But —

Q. Do you recall —

MR. GOLDMAN: Let him finish the answer.

MR. SELVA: All right. Go ahead.

A. (continued) — but the procedure I always followed from the time I came there in February was to thoroughly investigate the shortages by rechecking the figures, staying on Saturday, coming back on Sunday, and finished up on Monday, if necessary. Rechecking the figures, going back through all the details supplied by the people throughout the plant, and also checking physical inventories, checking sales analysis. All those things we did.

Q. You were looking for error, weren't you?

A. We were looking for error, yes.

Q. But you did not —

A. And whatever we found, we corrected.

Q. And you think you corrected all the errors?

A. We corrected all the errors we found.

Q. But you forgot about the food, to estimate the food of the parts of the hog that fell on the floor, didn't you?

A. The parts of the hog that fell on the floor in the hog

cutting room would be the parts that would be considered normal cutting shrink.

* * *

[414] Q. Now, you have on this chart that you must have observed as you looked at it, "average selling price dollars"; is that right?

A. That's right.

Q. Now, when you put average selling price, do you get those figures from a weekly price sheet put out by [415] packers to the retail trade?

A. No sir.

Q. You don't check that?

A. No sir.

Q. That is the price, however, that you sell the article for, isn't it?

A. That is right.

Q. All right, can you tell me whether or not those prices vary from week-to-week, let us say, fresh pork? Say with the first category for a while?

A. Yes, sir.

Q. How much would they vary from week to week?

A. On the averages, overall averages, from week-to-week, would probably, in normal years, not vary more than five or ten cents.

Q. Five or ten cents a week?

A. Five or ten cents a pound.

Q. That is per week?

A. You asked me whether the average selling price throughout a period, throughout the year, would vary, and I say it would vary some. Some weeks it would be higher and other weeks lower, depending on the cost of live animals and other factors.

Q. How did you get the average selling price?

We took our sales records and divided the [416] sales dollars by the number of pounds sold.

Q. Without any knowledge of whether more pounds were sold at the high or low figure?

A. That would make no difference in determining the average.

Q. All right. When you deducted these last three weeks that you speak of, weeks of September 16th, September 26th and September 30, I think it was, did you deduct the full weight from your claim or did you deduct an average again?

A. I deducted an average for the period. I took 1/16 loss and attributed it to those three weeks.

Q. You had the figures to deduct, actually, didn't you? Didn't you sir?

A. At one time we did have the figures. I didn't have them.

Q. When did you first decide to make that deduction?

A. We made it recently when Mr. Goldman pointed out to me that our claim was for a period in excess – past the point wherein the theft was discovered.

Q. And so, therefore, although you had coverage until November 1, 1950, you are not making a claim now for a loss, or alleged loss, of 11,096 pounds which occurred on September 16th, or an alleged loss of 3707 pounds which [417] occurred on September 25th, or an alleged loss of 6600 pounds which occurred on September 30th; is that correct?

A. We do not maintain that any of these losses were attributable to any particular week, and by that same token in eliminating these three weeks, we did that just to take our loss and cut it down so it would not be said that we are asking for – we have a claim in excess of the period. We feel that the

Q. I am not asking you what you felt. I am asking you what you did.

A. We took our loss for the period and in order to avoid any difficulty, we just took 1/16 of it and reduced it in order to come back to the weeks which could be stated were in the period on the claim. We made no claim for any week after September 11th, although perhaps we could have.

* * *

[418] Q. But you still had that loss going right along there after September 11th, didn't you?

A. We don't rule out the possibility of the loss having existed for –

Q. I didn't ask you whether you ruled out. I asked you if it is not a fact that you still had these shortages, September 16th, 11,000 pounds, September 25th 3700 pounds, September 30th 6600 pounds, after the date upon which Willie Harris was apprehended.

A. Those figures do not necessarily represent the shortages of those particular weeks.

Q. All right. They are there, aren't they, speaking of these three from Mr. Hadler's work sheet?

A. Yes –

Q. And on this work sheet you notice various weeks from November 5th all the way to September 30th of 1950, do you not?

A. That's right.

Q. I am speaking of November 5, 1949, and after each week you see an alleged shrink or an alleged gain, don't you, by week?

A. That's right.

Q. Not by total, but by week, do you not?

[419] A. Yes, sir.

Q. And still the net of each week does not gain a thing?

A. No, sir.

Q. All right.

A. We know that meat can gain weight and those gains do not mean that the meat – that the pigs had pigs, I guess. Neither do the shrinks necessarily mean in any one week that there was theft during that week.

Q. But in computing the excess alleged shrinkage and alleged resulting unexplained loss which appears – do you have your computation sheet, sir? – on the computation sheet that you now have?

A. I am sorry, I don't follow you.

Q. Let's withdraw it. In computing the figures contained on the computation prepared by Mr. Hadler, you will notice at the top of the left hand corner "computation for 47 weeks ending October 22, 1949", do you not?

A. Yes, I notice that.

Q. And in Mr. Hadler's tapes you find the gain or shrink represented on each one of these product analysis sheets for the period in question, is that right?

A. Yes, sir.

Q. And now you say that these mean nothing, is that right?

[120] A. I say that Arnold, Hawk & Cuthbertson were not told how to go about the business of determining the amount of this stuff. They could just as easily have taken the

Q. I didn't ask what they could have done.

A. They could just as easily, if they wanted to, determine the loss of 48 weeks. To start with opening inventory for 48 weeks and going to the transfers and purchases and subtracting out the sales and transfers, they would have come up with exactly the same result, and not becloud the issue by showing results of individual weeks.

Q. You think these weekly product analysis sheets be cloud the issue?

A. Inasfar as any single week by itself is concerned, they do.

Q. In this computation, Mr. Hadler, the CPA that you employed, only looked at the weekly product analysis sheets, transferred those figures on the tape and added those figures and came up from those figures that he took from this product analysis sheet with the exact amount that are appearing on this claim, didn't he?

A. Yes, but the sheet that he came up with here does not show any individual week. My contention is that the individual week by itself does not mean anything. That is why we took out the last three weeks. He would have come [421] up with the same result had he eliminated and used all the data on these sheets to eliminate the weekly variations.

Q. Now, Mr. Solomon, as treasurer of the company you have a closing on October 31st of each year, don't you?

A. That's right.

Q. Was there any reason for terminating the first 17 weeks of this period on October 22, 1949 instead of October 31, 1949?

A. Yes. The reason was that we could not find the figures for that particular week, the folder, because it was the end of the year, perhaps had gotten more attention than the rest of the folders and could not be found with the rest of them.

Q. So, without that analysis sheet, you were unable to include, or at least Mr. Hadler was unable to include any figure for the 18 weeks, so he stopped at 47 weeks, is that right?

A. I assume that is what he did. I say, again, I did not tell him how to do his job.

[438] Q. And all of these other figures, when you talk about normal shrink, excess shrink, unexplained loss, you use an arbitrary percentage to arrive at those figures, don't you?

A. We don't feel they are arbitrary.

Q. You don't feel they are arbitrary?

A. No.

Q. It is 3, isn't it, in the case of fresh pork cooler weight? I mean on the computation sheet.

A. In computing the loss on fresh pork, we started with a figure that was already 3 percent less than the hot weight and in order to be what we felt was conservative, we took an additional 1/2 percent as normal shrink. So, the computation 9,758,000 pounds we referred to above –

Q. That is the beginning.

A. (continued) – is already shrunk 3 percent.

* * *

[440] Q. Now, Mr. Solomon, I just want no explanation to begin with, please. Can you tell me the number of pounds of meat that was given to the cafeteria by the Sucher Packing Company for its employees during the second period which runs from November 5th to September 9th of – at this time?

[441] A. I can't, but only because I couldn't find the record.

Q. Another record you couldn't find, is that it?

A. Yes, sir.

Q. All right. So, how did you arrive at the credit which you are now allocating at the beginning of this trial as a credit on the loss? Just pick some figure out of the air, or just estimate it?

A. You mean the credit I was talking about this morning?

Q. I was talking about the credit Mr. Goldman gives to this cafeteria meat.

A. We arrived at that based on the number of pounds being consumed in the cafeteria today, and allowing for the fact that we now have in excess of 300 employees. We had 200 at that time. Subtracting it from the claim at an average cost, that would eliminate it from the claim and being very generous about the concession.

• • •

[461] Q. Mr. Solomon, continuing your interrogation, I hand you what is a transfer sheet for the week ending February 11, 1950, and ask you to examine it. The hams, the callies, the bellies, and tell me whether or not the transfers of those items into other departments are generally in round figures?

A. The figures are shown here all end in zeros or five, but that is customary.

Q. All right. So, those actually are approximate figures, are they not?

A. They are not to the exact pound. However, they are not wild guesses, either.

Q. I said they were approximate figures. By that I mean, where you have hams 10 to 12 transferred on Monday at 2810, it might be 2818 pounds, or 28 pounds, might [462] it not?

A. That is 5 or 10 pounds either way.

Q. Only 5 to 10 pounds variance in these figures.

A. Yes, sir.

[470] MR. GOLDMAN: Your Honor, I object. It has been testified a number of times that the intermediate inventory do not have any effect on the claim.

THE COURT: That is what you claim. I take it that

is probably a question for the jury to determine from the evidence.

MR. GOLDMAN: It is a mathematical fact, your Honor.

193 Q. As a matter of fact I was ordered not to interview Mr. McConkey, wasn't I?

A. Yes, sir.

Q. Sure.

A. Not to interview Mr. McConkey unless our company counsel was present.

Q. Well, he was in Cincinnati, wasn't he?

A. I think he was on that particular day, yes sir.

Q. He is there permanently, isn't he? Isn't that where his office is?

A. He is available to us, when we need him.

Q. Did you try to get him in that morning?

A. I think on that particular day his wife had a baby.

193 MR. GOLDMAN: Your honor, there isn't any doubt about the matter. I was not present and I requested Mr. Selva on the telephone not to go out there unless I was present, also, my wife had a baby on that day. I could have come up and he went out anyhow. On my instructions he was ordered to leave the premises until I could get out there.

197 Q. Give the week November 5th, 12th, 19th, 26th, December 3rd, 10th, 17th, 24th, 31st, January 7th, 14th, 21st, 28th, February 4th, 11th, 18th, 25th, March 3rd, 12th, 18th, 25th, April 2nd, 8th, 16th, 23rd, 30th, May 7th, 13th, 20th, 27th, June 3rd, 10th, 17th, 24th, July 1st, 9th, 16th, 23rd, 29th, August 5th, 12th, 19th, 26th, September 2nd, 9th, 16th, 25th, and 30th, why did you give him those

particular weeks and have him itemize them on that schedule?

A. I gave the firm of Arnold, Hawk & Cuthbertson all the information that they asked me for. I gave them no instructions as to which way to itemize the particular information. By omitting the interim inventories during this period, and using only the inventory beginning the week of November 5th and the inventory at the end of the week of September 30th, the firm of Arnold, Hawk & Cuthbertson could have come up with exactly the same results, completely ignoring all interim inventories.

The sheet that we give them contained all of the figures of production and sales and transfers, which when combined with the inventory at the beginning week of November 5th and the inventory at the ending week of November 30th would have come up with exactly the same [498] net results shown on this sheet, without showing any gain or loss in any one week.

Q. Assuming, of course, your basic figures were correct?

A. Yes, sir.

REDIRECT EXAMINATION

500 Q. Mr. Solomon, in answer to a question by Mr. [illegible] you stated that a certain photostat which has been previously identified as Defendant's Exhibit M, you stated that that was the only record of that kind that you had in Western Hardware Corporation. Will you please tell us the name of that record and what that type of record is?

A. [illegible]

pared at the time that a man is employed and carries the record of his employment, his increases and transfers throughout his employment at the plant. This record is only prepared for full time employees who are put on the payroll. Any day laborers would not have such a record. Normally, this record is kept for an employee for an unlimited period of time and if he should leave, because of reduction in force, or temporary layoff, or resign, and ever come back, the same card is used. In some instances, though, several [501] cards are prepared because the original card cannot be located in time to be used for the next payroll that a man should appear upon.

Q. Now, with respect to day laborers, is there any other sort of record that was kept?

A. Well, with respect to day laborers, there would be — the basis of their payments would be a time card which the superintendent and the foreman would have prepared and the payroll clerk would pay on the basis of that card, rather than on the basis of an hourly rate shown on an employment record.

Q. Have you maintained the employment record that far back of day laborers in a complete state?

A. No. We had a wages and hour investigation that carried through 1953 and at that time we disposed of quite a few records.

Q. That is after the investigation?

A. Yes. We disposed of the old time cards and records of that type.

Q. Now, however, were you able by search to find any time cards of day laborer for William Harris?

A. Yes. I found one card that in cleaning out our cabinet we missed one drawer, and I found a payroll there in early 1950 in which there was a card for William Harris.

which I identified as the William Harris on this employment [502] card by a social security number.

* * *

[510] Q. Now, in Plaintiff's Exhibit 6 for identification, there is an additional item in column of normal shrinkage of 1/2 percent for fresh pork. What was that for?

A. I think we can say that the 1/2 percent additional for fresh pork was thrown in for good measure, just to be on the safe side.

Q. At the time that the claim was prepared, Mr. Solomon, did you consult others besides your own staff with respect to the amount to use for computing normal shrink?

A. Yes. I consulted with the officers of the company and with packers that we were on friendly terms with. I remember writing to the American Meat Institute in Chicago, of which we were a member at that time.

Q. And did you receive a reply, do you know, from the American Meat Institute?

A. Yes, we did.

MR. GOLDMAN: Mark this for identification as Plaintiff's Exhibit 8.

Thereupon said document was marked for [511] identification as **Plaintiff's Exhibit No. 8.**

Q. I hand you, Mr. Solomon, what has been marked as Plaintiff's Exhibit 8, which purports to be a letter from the American Meat Institute dated November 16, 1950. I will ask you if that is the reply you received on the subject of normal shrinkage from the American Meat Institute?

A. Yes, sir.

MR. GOLDMAN: We offer it in evidence.

MR. SELVA: We object.

THE COURT: Sustain the objection.

MR. GOLDMAN: We will proffer it.

Q. I will ask you, Mr. Solomon, whether your company figured a shrinkage of 3 percent in its general accounting procedures both before and after the period of this claim?

A. Yes, sir.

MR. SELVA: Did you finish your question?

MR. GOLDMAN: Yes, sir.

MR. SELVA: Then I object.

THE COURT: I will sustain the objection for the reason that would not be proper redirect examination and that has been testified to.

. . .

[512] Q. Mr. Solomon, yesterday, or I should say last week, you referred to the product analysis sheet for the week of January 8, 1949, in which a computation was made in which it was shown that the inventory appearing on the sheet as a closing inventory of 81,853 pounds was in excess of the opening inventory, after adding the transfers in and transfers out in sales, and you stated, I believe, that the difference was reflected in what was recorded as a gain for that week. I will ask you to look at the product analysis sheet for the week ending January 8, 1949, and ask you if those 2697 pounds as shown on this sheet as a gain?

A. Yes, they are.

Q. What is your statement with respect to there being an actual gain as distinguished from a gain on paper?

A. Well, it is impossible for meat to gain weight. Certainly there could not have been that gain. That gain was the result of the — perhaps of the overstatement of the final inventory.

Q. Now, I hand you the product analysis sheet for the immediate following week, week ending January 15, 1949.

and ask you what that shows for the opening inventory for fresh pork?

A. Shows 81,853 pounds.

[513] Q. That is the same as shown for the closing inventory for the preceding week?

A. Correct.

Q. If the inventory for the preceding week was in error by being overstated, what effect would that have by being used in the following week?

A. It would cause a shrink in the following week.

Q. What is the reason for that?

A. Because the opening inventory being the amount charged in to be counted for that week, would be in excess of what could possibly be accounted for since it was not there. Therefore assuming that the inventory at the end of the second week is correct, that amount which could not be accounted for would appear as a shrink.

Q. What do you show on fresh pork as to shrink or gain the week — on the paper, at any rate, for the week ending January 15th, the week following the week which was tabulated here on the board?

A. Shrink of 1816 pounds.

Q. And if you were to assume, as has been indicated by the figures, that the opening inventory was overstated 2697 pounds, how would that affect the actual shrink?

A. It would make no difference at all in the [514] actual shrink because the only error would be the erroneous figure in the (interim.)

Q. What effect, however, would that have in computing the shrink from the figure which you read from the sheet?

A. It would reduce the shrink of the second week, or would reduce the shrink of the two weeks' period by the amount of 2697 pounds.

[515] Q. I hand you, Mr. Solomon, what has been

marked as Plaintiff's Exhibit 9, and ask you if that is a copy of the policy which involved in this case?

A. Yes.

MR. GOLDMAN: I would like to offer that in evidence, your Honor.

THE COURT: It may be admitted.

* * *

[519] Q. Mr. Solomon, after the employees were apprehended on September 11, 1950, what was done with respect to notifying the insurance company? That is, the defendant, Manufacturers Casualty Insurance Company, of the occurrence?

A. We immediately contacted the agent in Dayton of the Manufacturers Casualty Insurance Company, who was John L. Macbeth of the Manufacturers Casualty Insurance Company and notified him of the occurrence and we were particularly anxious at that time that —

THE COURT: Just a minute. Not what you were anxious about. What you did was the question.

A. (Continued) — we notified the agent and we asked him if our notifying him —

MR. SELVA: We object, if the Court please, to the conversation, if there was any.

THE COURT: Sustain the objection.

MR. GOLDMAN: Your Honor, the man is the agent for the company. He is the man who represented them in obtaining the policy. Under the terms of the Ohio Statute [520] I believe he is considered the agent of the company.

THE COURT: Well, he says he notified him.

MR. GOLDMAN: The answer in this case denies there was notice, your Honor.

THE COURT: You don't have to anticipate the defense.

MR. GOLDMAN: I suppose that is so.

Would you mark this for identification, please, as Plaintiff's Exhibit 10.

Thereupon said document was marked for identification as **Plaintiff's Exhibit No. 10.**

Q. I hand you a document which purports to be a letter from Mr. John L. Macbeth, — John L. Macbeth Company, dated September 18, 1950, identified as Plaintiff's Exhibit 10, and ask you if you received that letter?

A. Yes, sir.

Q. On or about the date thereon, September 18, 1950?

A. September 18, 1950.

MR. GOLDMAN: We offer that in evidence, your Honor.

MR. SELVA: Object.

THE COURT: Let's see it.

(Counsel hands letter to the Court.)

I will sustain the objection.

[521] MR. GOLDMAN: May I ask your Honor for the ground? It is anticipating the defense, is that your Honor's ruling?

THE COURT: Well, that, and it is a letter from the agent. I don't know whether he is acting within his authority or not.

MR. GOLDMAN: Under the Ohio Statute he is their agent. They cannot avoid his authority.

* * *

[523] Q. Mr. Solomon, did you subsequently send to the insurance company a proof of loss?

A. Yes.

MR. GOLDMAN: Mark this for identification please, as Exhibit 11 and 11-A.

Thereupon two documents were marked for identification as **Plaintiff's Exhibit Nos. 11 and 11-A.**

Q. Hand you, Mr. Solomon, what has been (524) identified as Plaintiff's Exhibit 11, and ask you what that is.

A. That is a copy of a registered transmittal letter sent to the Manufacturers Casualty Insurance Company, of Philadelphia, transmitting the itemized proof of loss, duly sworn to, under policy No. 69f99. The letter is dated January 7, 1951. I wrote it.

Q. I hand you what has been identified as Plaintiff's Exhibit 11-A, and ask you what that is.

A. That is a copy signed by me of the itemized proof of loss.

Q. Was that enclosed with Plaintiff's Exhibit 11 and transmitted to the Manufacturers Casualty Insurance Company?

A. Yes, sir.

Q. To the address stated on the letter?

A. Yes, sir.

* * *

530 Thereupon said copy of a letter was marked for identification as **Plaintiff's Exhibit No. 13.**

Q. I hand you Mr. Solomon what purports to be a copy of a letter from Mr. Green, of Pickrel Schaeffer & Ebeling, Dayton, dated January 15, 1951, and ask you if

the original of this letter was transmitted to Mr Green in the ordinary course of business?

A Yes.

* * * *

RECROSS EXAMINATION

541 Q But you did hire detectives that you know of?

A Yes.

Q And did you put on extra guards?

A Yes, sir.

Q And you did strengthen fences?

A Yes, sir.

Q And you did put up a closer check of in going and out going employees?

A Yes, sir.

Q And you knew acts were going on then which would give rise to a claim, didn't you?

A If we could find it.

Q You knew acts were going on?

A If we could find the individuals and catch them it could give rise to a claim.

Q That is your interpretation?

A Yes, sir.

Q But you never notified the Manufacturers Casualty Insurance Company of these substantial losses starting November 5th and going right on through, representing unexplained shrink, did you?

542 MR GOLDMAN Do you have reference to the Home office in Philadelphia? Are you restricting it to that?

MR SELVA I don't care whom he notified.

Q Did you notify the Manufacturers Casualty Insurance Company in Philadelphia?

A. No.

Q. Did you notify anybody of the Manufacturers Casualty Insurance Company of the loss arising the week ending November 5, 1949?

A. For that particular week?

Q. Yes. Sure. That is the week when the loss was sustained.

A. I don't remember.

Q. Would your answer be the same on each and every one of these weeks? Until September 11th?

A. No, sir.

Q. All right. Let's see which weeks you remember.

A. I don't Remember what week. Mr. Beerman contacted Mr. Macbeth to determine if our insurance covered this type of loss.

Q. But –

MR. SELVA: That is not in answer to my question. I asked him whether or not he made any report to anyone.

Q. Do you want to say now that you made a [543] report to Mr. Macbeth?

A. I talked to him about it, sure.

Q. You did? All right. When did you talk to him about any loss in this schedule?

A. I worked in Mr. Beerman's office from July, 1948 and from then until the time I went to Suchers. I remember being instructed to find out.

Q. I didn't ask you what you were instructed to do. I asked you to tell me when you talked to Mr. Macbeth.

A. I don't remember at this time the exact date.

Q. Don't you remember in July or August of 1954 that you never talked to him before September of 1950?

A. I am sure that I talked to him before September 1950.

• • •

[559] Q. And there could be a deviation up or down in the hams, picnics, bellies and the jowls?

A. In each vat a few pounds a vat.

Q. That affects the transfer-out of fresh pork?

A. Insofar as the net deviation that is true.

Q. You don't know what the net deviation would actually be, do you?

A. Well –

Q. They are all even figures here.

A. We know from experience that the net deviation would be very small, would be between 5 and 10 pounds a vat.

Q. Between 5 and 10 pounds a vat?

A. Roughly.

Q. All right, roughly. What would the deviation be in the week ending January 15, 1949, in hams?

A. I would say it would probably be zero, because there would be as many vats over 1400 pounds as there would be under 1400 pounds.

[564] MR. GOLDMAN: In view of the question asked Mr. Solomon concerning Mr. Macbeth's letter, I should like to re-offer the letter at this time, the letter of September 18th, as Plaintiff's Exhibit 10.

MR. SELVA: We object. It is not an exhibit yet.

THE COURT: Do you object?

MR. SELVA: Yes, sir.

THE COURT: I will adhere to the ruling heretofore made.

* * *

Testimony of Robert Hadeler

DIRECT EXAMINATION

[565] Q. State your name, please.

A Robert Hadeler

Q What is your address, Mr. Hadeler?

A 410 Wiltshire Blvd., Dayton, Ohio

Q And with what firm are you connected?

A Arnold, Hawk & Cuthbertson, Certified Public Accountants

Q For how long have you been in public accounting work?

A I have been with Arnold, Hawk & Cuthbertson since the beginning of 1948; and prior to the war I was in [566] public accounting for approximately four years.

Q Are you a certified public accountant?

A Yes, I am.

Q Mr. Hadeler, did you have any occasion to make any studies at the Sucher Packing Company in connection with product that was said to be missing?

A Yes, I did. Shall I elaborate?

Q Tell us what you did.

A Well, the company called us out and requested that we make a study of their records with a view to determining the extent of any unexplained losses, any inventory disappearances which we could determine from those records. We proceeded to make that study.

Q I hand you, Mr. Hadeler, what has been marked as Plaintiff's Exhibit 6 for identification, previously, and ask you what that is.

A Well, this is a schedule which we prepared based on the study which I have just referred to. It is entitled

Computation of Excess Shrinkage and Resulting Unexplained Loss".

Q. What records did you use to make that compilation?

A. Basically, we worked with sheets that the company keeps each week. They are called "Product Analysis Sheets".

[567] Q. Why did you use those sheets as the basis for your computation?

MR. SELVA: Object, if the Court please.

THE COURT: Sustain the objection.

Q. Are you familiar with the procedure set forth in the product analysis sheets of the company?

A. Yes, I am. We never made an exact audit of those sheets. However, we have from time to time reviewed the procedures followed at the company in preparing these product analysis sheets. We believe the procedures followed to be sound. If those procedures are properly followed, they will give a satisfactory answer and feel the result not showing any disappearances which could not be legitimately accounted for. –

MR. SELVA: Move the answer to be stricken because it is not responsive to the question.

THE COURT: It may be stricken.

Q. Will you state in your opinion, Mr. Hadeler, whether, based on your accounting experience, whether the product analysis sheets are or are not a sound procedure, if properly followed?

MR. SELVA: If the Court, please, we object to that.

THE COURT: Sustain the objection.

MR. GOLDMAN: (Out of the hearing of the jury.)

[568] Proffer the answer. Yes, they are sound.

Q. In your opinion, Mr. Hadeler, based on your experience as an accountant, will you state whether or not the product analysis sheet, if properly followed, reflect the disposition of products at the Sucher Packing Company?

MR. SELVA: We object to that, if the Court please.

THE COURT: Sustained.

MR. GOLDMAN: Your Honor, can't we show -- this man is an expert--his opinion as to the character and soundness of the method, not referring now to the accuracy of any particular figure, just to the method.

THE COURT: No I don't think it is a proper subject for expert testimony.

MR. GOLDMAN: (Out of the hearing of the jury) Proffer the answer and state that the witness, if permitted to answer, would say that in his opinion the procedures of the product analysis sheets, if properly followed, will show the complete disposition of the product.

(In the hearing of the jury) I would like, at this time, to offer the exhibit in evidence, your Honor, Plaintiff's Exhibit 6.

MR. SELVA: No objection.

Thereupon a document entitled "Computation of Excess Shrinkage and Resulting Unexplained Loss" was admitted in evidence as **Plaintiff's Exhibit 6.**

569 MR. GOLDMAN: For the purpose of convenience I would like to pass them among the jurors, so they will understand what I am questioning the witness about.

(Thereupon copies of Plaintiff's Exhibit 6 were passed to each of the jurors.)

Q. Mr. Hadeler, referring to Plaintiff's Exhibit 6, will you please explain the various headings and items in that exhibit.

A. Well, starting right up at the top, we have a fresh pork item and reading across the page, the carcass weight

processed in pounds, that is the total weight of dressed hog carcasses that were processed during the period of the 47 weeks ending October 22, 1949. Then, in the following two columns, we have the sales expressed as pounds, 3 million and some odd and 1 million dollars, and the average selling price in dollars is the average selling price of those pounds. And going on further, there is a column entitled "Weight Shrinkage in Pounds". That is a recap weight shrinkage, as shown on the product analysis sheets for each of these 47 weeks we are talking about as they relate to fresh pork.

Q. Ask you whether in that connection any gains shown on the product analysis sheets were subtracted from the shrinks?

A. Yes, in certain weeks because of certain [570] inaccuracies in the inventories, which have no overall effect on this. We have deducted any overages on the shrink.

MR. PICKREL: Owing to certain inaccuracies in the inventory?

THE WITNESS: In the intervening inventories, yes, sir.

Q. Now, with reference to the carcass weight processed in pounds, I noticed you have a note at the bottom of your sheet reading "Fresh Pork carcass weight as dressed weight after deducting 3 percent allowance for cooler shrinkage". What is that, please?

A. The practice at the Sucher Packing Company is to weigh the hogs carcass immediately after they are slaughtered. Of course, they are still warm at that time. There is a shrinkage in the industry. It is generally recognized a shrinkage from the hot weight until they are cooled and further processed and finally disposed of, and this 3 percent shrinkage has already been deducted when we arrive at the 199,000 weight shrinkage, which is shown.

Q. If I understand you then, is the 199,100 pounds of weight shrinkage, after the 3 percent is already deducted or before?

MR. SELVA: We object to the form of the question, summarization.

MR. GOLDMAN: I am asking him whether it was after [571] or before, so as to make it clear, your Honor.

THE COURT: Well, it is leading in form. Let him testify.

A. The 3 percent shrinkage has been deducted and this 199,000 is an additional shrink on top of the normal 3 percent shrinkage.

Q. And what is your next column?

A. The next column headed "Normal Shrinkage", and is explained in the footnote. Normal shrinkage is expressed as percentage of carcass weight processed in the case of fresh pork. Just a further shrinkage allowance that has been put into these figures.

Q. What is the column headed "Excess Shrinkage"?

A. Well, that is the shrinkage. That is really the 199,000 with the 48,000 taken away from it. It is the excess shrinkage as to the column—as the column says. It is the shrinkage from the normal shrinkage.

MR. SELVA: We object, if the Court please. The normal shrink hasn't been determined yet.

THE COURT: I will overrule the objection.

Q. What is the last column?

A. It is entitled "Unexplained Loss", and it represents the column headed "Excess Shrinkage" multiplied by the average selling price. It is the excess shrinkage expressed in terms of dollars, in other words.

[572] Q. Now, with respect to smoked pork and the sausage items that are on there, are the figures in their respective columns analogous with respect to them?

A Yes, sir. They are basically the same type of figures.

Q Now, then, below the middle of the page you have a heading "For 48 weeks ended September 30, 1950." Will you explain that, please?

A Well, it is intended to be comparable to the period given above. The figures are the same type of figures for a subsequent period to that shown above.

Q The figures you have under total for 47 weeks ended 9/22/49 just above the middle of the page in dollars.

A That line right on across equals the total for that period. The final figure are you referring to?

Q Yes.

A $104,183.82.

Q What does that cover?

A The column is entitled "Unexplained Loss." It represents a disappearance which we could not account for through the legitimate transactions that were recorded on these sheets.

MR. SELVA: We move the answer be stricken.

THE COURT: Sustain the motion.

Q Were you able to account for the amount ($73) called "excess shrinkage" from the figures that appear on the weekly product analysis sheets?

MR. SELVA: We object.

THE COURT: I will sustain the objection. I think it is just what he says it is. As far as they are concerned it is unexplained loss. All he was working with were the books.

MR. GOLDMAN: Correct, your Honor. As far as he was concerned there was no explanation given for it in the books.

THE COURT: As he said, it is unexplained loss obtained from the books.

MR. GOLDMAN: Mark these as Plaintiff's Exhibits 14 A and 14 B.

Thereupon a group of papers was marked as **Plaintiff's Exhibit 14-A** and **Plaintiff's Exhibit 14-B.**

Q. I hand you, Mr. Hadeler, a group of papers which have been marked as Plaintiff's Exhibit 14-A, and ask you what they are?

A. They are work sheets which we prepared in working up this Plaintiff's Exhibit 6.

Q. And which of the two periods do these work sheets cover?

A. These belong to the 48 week period in September 30, 1950, the period shown on the bottom of [574] Exhibit 6.

MR. GOLDMAN: Mark those adding machine tapes 14-C.

Thereupon said adding machine tapes were marked for identification as **Plaintiff's Exhibit 14-C.**

Q. I hand you a group of adding machine tapes, and ask you what they are? They have been marked as Plaintiff's Exhibit 14-C.

A. These are adding machine tapes which we ran to prove the totals on the sheets I am holding in my hand here.

Q. Exhibit 14-A, in which the figures are written in longhand?

A. We have tapes here listing this column, for instance, coming down with the total. I presume the rest of them are similar.

Q. Do you want to look at them and see?

A. (The witness does as suggested by counsel.)

Q. You have taken from the tapes a group of tapes, Mr. Hadeler, those which relate to the work sheets you have in your hand?

A. Yes, sir.

Q. Now, I hand you a group of papers which have been marked Plaintiff's Exhibit 14-B, and ask you what those are?

[575] A. These are our work sheets for the subsequent or prior period to this. In other words, for the period ended in 1950, we actually tabulated in longhand the numbers and then ran tapes on them. When we were working up the figures for the period before that, instead of writing them out in longhand, we put them directly on an adding machine tape and ran them directly on them. This represents our work sheets for the other period. For the period for the 47 weeks ended October 22, 1949.

Q. I notice, Mr. Hadeler, that under fresh pork weight shrinkage, the adding machine tape on Plaintiff's Exhibit 14-B, there are some pencil notations at the bottom. What does that indicate?

A. Well, in running that tape, we apparently made some errors and we are just correcting the errors we made in running the tape. Incidentally, we ran two tapes to make sure we were picking up the right figures and proved them out at the bottom. On this one tape, we made some errors that we had to correct, and finally the totals on each tape agreed and we have done that throughout.

Q. Were the totals, as corrected, the figure you entered in Plaintiff's Exhibit 6?

A. Yes. It is the weight shrinkage for fresh pork, 199,100 pounds.

Q. Now, the totals that appear with minus after [576] them in the column, what does that indicate?

A. In certain weeks, instead of having a weight shrinkage there might be a weight gain. Those would be shown here as a minus figure, and they are deducted from the overall total. The shrinkages are shown as plus figures and

the gains minus figures. So, we get down to a net shrinkage figure.

MR. GOLDMAN: I would like to offer in evidence Plaintiff's Exhibits 14-A, 14-B and 14-C, your Honor.

MR. SELVA: No objection, if the Court please.

THE COURT: They may be admitted.

MR. GOLDMAN: Thank you.

Thereupon said documents were admitted in evidence as **Plaintiff's Exhibits Nos. 14-A, 14-B and 14-C.**

Q. Mr. Hadeler, you have testified something with reference to intermediate inventories, a gain might show up because an intermediate inventory might not be correct. Does it make any difference in the total overall computation for either of the two periods as to whether or not the intermediate inventories were correct?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Isn't that a matter of expert testimony, your Honor? The average person may not understand that.

[577] THE COURT: No, I don't think it is a matter of expert testimony. I ruled that out the other day.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say "No."

In the hearing of the jury? Your Honor, I asked the witness to prepare an illustration to indicate that particular point so as to make it easily understood in the event that anybody here might have difficulty understanding that and I would like to have the witness be permitted to get this illustration so as to make the point clear as a matter of — as an expert. I can show you what I have in mind.

MR. SELVA: Is that in the form of a question?

MR. GOLDMAN: No. I am making a statement to the Court.

MR. SELVA: We object to this procedure.

MR. GOLDMAN: I can show you what I have in mind as an illustration. (Hands illustration to the Court.) To make it a matter of record, I will proceed with the question.

Q. Mr. Hadeler, have you prepared an illustration indicating what effects, if any, errors of intermediate inventories have on computing shrink for a period of time?

A. Yes, I did prepare such a statement.

MR. GOLDMAN: Would you mark this please?

[578]

Thereupon a document was marked for identification as **Plaintiff's Exhibit No. 15.**

Q. I hand you, Mr. Hadeler, what has been marked as Plaintiff's Exhibit 15, and ask you if that is the illustration you have prepared to illustrate the point?

A. Yes, sir; it is.

MR. SELVA: May I ask you, Mr. Goldman, do you speak of that as an exhibit? That is for identification, isn't it?

MR. GOLDMAN: For identification. I would like, at this time, your Honor, to have the witness explain the illustration and then offer the exhibit in evidence, if I may.

MR. SELVA: We object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I guess to get the matter of record then, will you explain the illustration? I understand an objection is made and sustained to that question, to which we except.

I would like to offer the illustration in evidence. I assume objection has been made and sustained to that.

MR. SELVA: We object to both questions. We enter an objection to the first question on the explanation and

the second question on the offer of the exhibit now [579] marked for identification.

THE COURT: I will sustain both objections.

MR. GOLDMAN: Exception, please, and proffer the exhibit.

Q. Putting the matter another way, Mr. Hadeler, except for the opening and closing inventories for the entire period in question, does any inaccuracy in any inventory make any difference?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say "no."

Q. Mr. Hadeler, you have stated in making the computation that you took the gains and shrinks as shown on the product analysis sheets, subtracted the gains from the shrink and get the net figure as the total?

A. Yes, sir.

Q. Now, is there any other way in which you could have arrived at the same total without doing that, from the product analysis sheet?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. If permitted to answer, the witness would say that you could take the opening inventory, add in all the purchases and [580] charge-ins, subtract all the charge-outs and sales and add the closing inventory for the entire period arrived at the same result, ignoring the shrink or gain for any particular week, and ignoring the intermediate inventory.

Q. Mr. Hadeler, if you took the product analysis sheet for those particular periods and took the opening inventory of the first product analysis sheet and added all the purchases and charge-ins for the entire period of each of the

sheets, and subtracted all the charge-outs and sales for the entire period, and then used the closing inventory of the last week of the period, and ignored all intervening inventories, and ignored the gain or shrink for any of the intervening weeks, as such, what would your result be as compared to the result that you obtained?

MR. SELVA: Object.

A. The result should be the same.

MR. SELVA: We object.

MR. GOLDMAN: When there is an objection made, you must not answer until the Court has ruled.

MR. SELVA: We object, if the Court please.

THE COURT: The answer may be stricken from the record and I will sustain the objection.

MR. SELVA: May we be permitted to ask that Mr. Goldman consider the ruling of the Court. We have now been compelled to object four times to the same question rephrased. [581] It puts us in the position of constantly objecting and we regret it and we apologize to the Court for it.

MR. GOLDMAN: I was hoping to avoid the earlier ruling by phrasing the question another way, just hoping your Honor might let it in. I do not wish to run counter to your Honor's rulings.

(Out of the hearing of the jury.) I will proffer the answer that is stricken.

* * *

CROSS EXAMINATION

[602] Q. And in tabulating those results you took the figures of shortages and gains from their weekly work sheets which they had prepared?

A. That is right. I might say further that we knew in general how these sheets were prepared. We had gone over them from time to time. We knew that basically the

procedures were sound. If they followed through they would get a correct answer by following through on the methods and procedures that they had set up.

[640] Q. Now, you have the week of March 18th. If you will look over this you will see how many are in round figures and otherwise, and then we will take the week of April 1st and then we will see the round figures. We won't take the time to add them all up. But you'll see them there. Then we will take the week of April so transferred to cure. You see those round figures more on some sheet than on others as you observe. All right. Then is April 8th. Now we will go over to the next week which is May 7th to cure, and you see the round figures there how many there are and what they indicate. We will take the next sheet, May 14th and you see the round figures.

A. Yes.

Q. We will go to May 27th and you see the — [641] 21st or 22nd with round figures there, and how much they indicate. Well now the others you can go on. I will ask the question. All the other weeks show similar round figures in considerable numbers involving considerable weight. Now I want to ask you as an accountant do you consider figures showing changes from fresh pork to cure in round figures in that manner careful, accurate figures or not?

A. Well it would seem to me you have to be reasonable in all these situations. As I understand it they transfer these in tubs or big vats. Now if a vat normally holds approximately 1400 and you are loading up 10 or 12 vats in a day the overages and shortages might balance out. So if you round them off at 1400 you would be light on the next, so to speak.

Robert Hadeler — Cross

Q Number one, there is no 8 or 10 a day on these steers. There is 3 or 4.

A At 1100 a day. There is one or two, three or four, I don't know.

Q That's right. But I am back to my other question.

A It is not exact accounting. I will grant you that. They could have weighed it down to ounces, or perhaps fractions of ounces. That would have been exact. It would have taken a little more time, and it would not have been significant in the overall.

642 Q So you think the mere fact time after time they transfer from fresh pork to cure, not what a vat or pan sold, you say that is good accounting?

A Well, in the place it is used, it is. I think it is reasonable accounting, yes, sir.

Q You think it is all right to do that in the meat plant?

A When a meat plant is accounting for its cash, I could expect to see the cash in banks started right to the penny. But when they are dealing in transfers from one department to the other, it seems to me reasonable to operate on this basis.

Q And you think it is good accounting?

A I would say it could be justified as good accounting.

* * *

Testimony of Arthur Beerman

DIRECT EXAMINATION

649 Q What is your connection with the Swift Packing Company?

A I am Chairman of the Board.

Q What is your interest in that company?

A Mr. Lowe, there are [illegible] principal owners of

the company. And then, of course, we have quite a few of our – about 60 employees that are stockholders.

Q And in 1950, what was the situation as to the ownership?

A In 1950, Mr. Berry and I were the only principal owners, Mr. Loren Berry.

Q When did you and the other Mr. Berry and possibly the other shareholders, become interested in the Sucher Packing Company?

A In 1944 when Sucher Packing Company was closed up, a group of us bought the assets of the plant and reopened it in January or February of 1945.

Q And have you been interested in it ever since?

A That's right.

Q Did you, at any time, go out to the Sucher Packing Company and spend any considerable amount of time out there?

A In 1948, I believe, towards the middle of the fiscal year, which would have been the early part of 1948, I found it necessary –

[650] MR. SELVA: Now, if the Court please, we move the balance be stricken. Mr. Goldman is waiting for the explanation. He did go out there and that was the answer.

THE COURT: Sustain the objection.

Q Mr. Beerman, what was the occasion for your going out there?

MR. SELVA: If your Honor please, we object to that.

THE COURT: Sustain the objection.

Q Prior to your going out there, Mr. Beerman, were you engaged in the meat business?

A I was a stockholder and part owner of the Sucher Packing Company.

Q Was that your main business?

A No, sir.

Q You went out there. What was your business prior to that time?

A I was in the real estate business as the head of the Beerman Realty Company but I found it necessary in 1948 –

THE COURT Now, just a minute, Mr. Beerman.

MR GOLDMAN Just a moment.

Q What were the conditions at the Sucher Packing Company when you went out there in 1948?

MR SELVA Object, if the Court please.

651] THE COURT I will sustain the objection. I think what you are interested in is what did he do when he got out there.

MR GOLDMAN Also what he found when he got there, your Honor. If your Honor feels that is an improper inquiry as to what he found when he got out there –

THE COURT Yes, I think it would give him an opportunity to state his reasons.

Q Mr. Beerman, tell us when you went out there how long you – what part of the day you stayed when you first went there?

A When I first started out at Suchers, I spent several hours a day, and the situation was so critical –

MR SELVA If the Court please, we move to strike the last three words.

THE COURT They may be stricken.

Q Tell us then, after you stayed there for a few hours a day, did you increase or decrease the time of your staying out there?

A I increased my time until I had moved a cot out there and stayed there 24 hours a day for a long – for several months with short naps in between.

Q During the period that you were out there, did you

take any steps of any kind to prevent or run down any thieves?

[652] MR. SELVA: Object.

THE COURT: Overrule the objection.

A. I found a lack of system.

THE COURT: Just a minute.

Q. State what you did.

THE COURT: The question is: What steps, if any, did you take?

A. Well, we employed Mr. Kenneth Smith and brought him to Dayton. He was formerly auditor and comptroller for a branch office of the Hi-Grade Meat Packing Company. We called in the National Cash Register Company and bought a 2000 machine, or analysis machine. We bought new posting machines. We bought other bookkeeping equipment to modernize, improve the office to the point where we could get to the bottom of the situation.

MR. SELVA: If the Court please, we object to the last remarks of the witness.

THE COURT: That may be stricken, "get to the bottom of the situation".

THE WITNESS: Does that answer your question?

Q. What, if anything, did you do with the employment of detectives?

A. We had quite a number of them. All of the detective agencies in the community, I believe, that are operating had worked for us at various times trying to [653] uncover any theft or thievery.

MR. SELVA: Move the latter part of the answer be stricken.

THE COURT: It may be stricken. The question was: Did you employ a detective agency?

THE WITNESS: We certainly did. Three or four different agencies.

Q Did you make any physical changes at the plant with respect to openings, doors, and things of that sort?

A We put guards on the outside, a guard building. We repaired all our fences. We closed the front yard and permitted customers and employees to come and go through a guarded passage and to the best of my knowledge, everything was checked in and out.

Q Now, Mr. Beerman, what, if anything, was done with respect to – if there was – with respect to closing up any openings?

A For several months we closed up additional entrances and windows, and any areas which were not properly guarded, and repaired, as I said before, the fences. Put new wire over the fenced areas. We added four or five guards that were on duty continuously 24 hours a day, seven days a week. We employed one or two people on the inside through these agencies, like in one case, it was Rose 654 Detective Agency. In another case, it was Sy Yendes, had one or two people there at times. Mr. Merica came in later, and Pfauhl – I think it is Pfauhl or Rose Pfauhl – he had some time with us until we made a change in order to uncover whatever possibilities there were.

Q Now, Mr. Beerman, anything done with respect to the locks?

A The locks were all either changed or added – All coolers, all freezer rooms, were locked up and we entered into – that is, storage holding coolers were entered into only by authorized people who had keys to the lock, the basement freezer rooms and basement pickling rooms. I guess they call them pickling rooms, cellars.

Q Now, Mr. Beerman, while you were out there, did you ever personally catch any employee stealing?

A Well, if I may, I can only talk about some of these incidents that occurred.

Q. That you know about yourself?

MR. SELVA: That he knows about personally, did he say?

THE WITNESS: Yes.

MR. GOLDMAN: Yes.

A. In one case, I was on the dock and a colored employee was leaving, and out of his pants leg was hanging, what I thought was a wiener, or something like that. And, of course, we immediately followed him to the outside gate and when he got through the gate — it was my understanding they had to leave the premises before you —

MR. SELVA: We object to the understanding. We would like him to confine himself to what he did.

THE COURT: Sustained.

A. (continued) — and when I called it to the attention of the employee and the guard, we pulled out a whole stick of wieners in the casings.

THE COURT: When was that, Mr. Beerman?

THE WITNESS: That was during — sometime in 1955, your Honor. We kept no record on the exact date. The only thing we did was to start to discharge the employee. It was still a minor situation, probably amounted to 40 or 50 or 60 cents. Another occasion, we had a foreman in the beet department. I noticed on two or three occasions that he had carried his own aluminum lugs on his shoulder.

Q. What is a "lug"?

A. It is an aluminum container that generally carries about 75 pounds of product and is used for deliveries or for the carrying of fresh products from one cooler to another and in and around the plant.

Q. Continue.

A. They weigh about 15 pounds, but full it is 75 or 80 pounds, and he had two lugs on his shoulder. I [656] think twice in several days I noticed, and I was inquisitive.

wondered why the foreman carried these back from the chilling cooler. They have to go through our shipping cooler in order to get back to the beef department, where he worked, and I think I pushed the lugs off his shoulder, a kind of jarred them a little, and they fell on the floor. And two boiled hams fell out. Of course, in this situation, the employee admitted only these two boiled hams and we recovered them.

Q. What did you do with this employee?

A. He had nine children and, of course, —

MR. SELVA: If the Court please, go ahead.

Q. What did you do?

A. We discharged him, but made no other charges against him, primarily because we recovered the product and in talking to him, he admitted only these two boiled hams.

Q. Mr. Beerman, during the time you were out there was there ever brought to your attention that there was meat products which could not be accounted for on the records of the company?

MR. SELVA: We object.

THE COURT: In 1948?

Q. How long were you out there, Mr. Beerman?

A. I would say from about the middle or early part of 1948 to the early part of 1949.

[657] Q. At any time, during the period that you were out there, was it ever brought to your attention that there was meat product of the company that could not — which disposition could not be accounted for on the records of the company?

MR. SELVA: Object.

THE COURT: Overrule the objection.

A. It started out with —

THE COURT: Just a minute. Answer that question yes or no, please.

A. Yes, sir. Can I explain that?

THE COURT: That answers the question.

Q. Tell us in what way it was brought to your attention.

MR. SELVA: Object.

THE COURT: Sustain the objection.

Q. Ask you whether that was a single instance, or whether there were more than one instance?

MR. SELVA: Object, if the Court please. This is all hearsay, unless this witness personally knows. That is one of the reasons for our objection.

THE COURT: Refer to the books.

MR. GOLDMAN: It was called to his attention in the records.

THE COURT: Refer to the records.

658 MR. GOLDMAN: The next question was whether that was on one occasion or whether that happened more than once.

MR. SELVA: Speaking now of the records being called to his attention?

MR. GOLDMAN: Yes.

THE COURT: Well, I think the pertinency of the question in the first place is somewhat doubtful. There is no materiality to it beyond the fact it was called to his attention and he knew it.

Q. Mr. Beerman, when you went to the Stecher Packing Company in 1938, in what capacity did you go there?

A. I took over the job of the general manager and president of the company.

Q. Now, during the period of time that you were with the Stecher Packing Company, did you have any occasion

to speak to Mr John Macbeth about the situation at Suchers?

MR SELVA We object

THE COURT I will sustain the objection

MR GOLDMAN Out of the hearing of the jury. Exception The answer would be "Yes"

Testimony of Francis E. Merica

DIRECT EXAMINATION

[667] Q Without referring to that employment, coming down to sometime after November, 1948, were you employed by the Sucher Packing Company?

A In, 1949

Q About when were you employed?

A It was in the fall of 1949

Q What did you do on that occasion?

A Well we assigned men out at the Sucher Packing Company at night to watch the fence and see who was coming in and out and whether they were carrying any packages, and such as that, but we didn't find anything.

Q When were you next employed by the Sucher Packing Company?

A In 1950

Q Calling your attention to the 11th day of September, 1950, do you recall going out to the Sucher [668] Packing Company on that day?

A Yes I do

Q When you [illegible] out there what did you do?

A [illegible] we had caught a truck driver

MR SELVA If the Court please, we object to what [illegible] he was asked what he did

THE COURT: Yes, the testimony of this witness should be limited to what he knows himself.

Q. What did you do when you got out there, Mr. Merica?

A. Well, I interviewed a fellow named Harris, that was an employee driving a truck at the Sucher Packing Company. He drove the trash truck and I was informed that he had –

MR. SELVA: Object.

THE COURT: Sustain the objection.

A. (continued) Well, in talking to Harris he told me he had been driving the trash truck.

MR. SELVA: We object to the hearsay testimony, the Court please. Mr. Harris has testified in this case.

MR. GOLDMAN: I think his answer would be admissible on the ground it is a declaration against interest.

THE COURT: Mr. Harris is not a party to the case.

MR. GOLDMAN: I am speaking of a declaration against interest, your Honor. Anything he stole, he would be financially responsible for. An admission of that kind would be a declaration against pecuniary interest.

THE COURT: I would have to see authority on that.

MR. GOLDMAN: We will continue on another subject.

Q. After interviewing Harris, did you interview any other employees?

A. Yes, I interviewed Jackson, Maiden, Hair.

Q. Do you recall an employee named Early?

A. That's right, at that time. I later interviewed all the employees in the entire plant.

[illegible] Q. What did Jackson tell you with respect to the [illegible] of the Sucher Packing Company?

MR. SELVA: We object.

THE COURT: That would get into the same matter.

MR. GOLDMAN: Yes, your Honor, it would.

THE COURT: Sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury. The witness, if permitted to answer, would say that Jackson said that he had been stealing from the Sucher Packing Company for five years.

* * *

Testimony of Ray McConkey

DIRECT EXAMINATION

[674] Q. Please state your name.

A. Ray McConkey.

Q. What is your address, Mr. McConkey?

A. 1227 Brumbaugh Boulevard.

Q. What is your occupation?

A. Superintendent, Sucher Packing Company.

Q. How long have you been superintendent at Sucher Packing Company?

A. Since September of 1949.

Q. And prior to coming to the Sucher Packing Company where were you employed?

A. I was with Peoria Packing Company, Peoria, Illinois.

Q. In what capacity?

A. Superintendent.

Q. How long have you been in the packing business?

A. Approximately thirty years.

Q. And as superintendent of the Sucher Packing Company what are your duties?

A To supervise processing of meats, slaughtering of animals and the packing and processing of meats, meat products.

Q Mr. McConkey, based on your experience, are you able to say – able to tell us the normal shrink due to natural causes that pork should undergo between the hog weight until the time it is chilled?

A Approximately –

MR. SELVA: We object, if the Court please.

THE COURT: I don't know that he is qualified yet by any testimony to answer that question.

Q Well, have you observed, in your experience in the packing industry and at Suchers, the amount of shrink that pork product or dressed hog will undergo between the time they are weighed hot and the time they are thoroughly chilled?

A I have.

Q What is that?

A Approximately 2 to 2½ per cent. That is from the hot weight to sales.

Q From hot weight to sales?

A Yes, sir.

Q How much of that occurs during the immediate chilling process?

A I would say 1½ to 2.

Q Percent?

[676] A Yes, sir.

Q And is there a shrink that occurs during the cutting process?

A Small, probably less than 1/4 of one percent.

Q Now, referring to the cutting process at Suchers, will you describe the cutting process as it took place in 1949 and up until September of 1950?

A Yes. The carcass, the chilled carcass is pushed to a

room which is adjacent. They are on rollers. This room is adjacent to the chill room and they are placed on a roller-top table and each man has his job to do. One man with a saw marks the ham and saws off the feet. Another man pushes the side through a bandsaw which removes the shoulder and then two men with saws that marks the pork loin. The pork loin is removed from the side with a curved-draw knife, the same shape as the pork loin. Then the sides are flattened out, the ribs are removed; bacon is trimmed, hams are trimmed and skinned. The shoulders have the neck bones removed and they are sawed into shoulder, picnics and shoulder butts. There are approximately 20 to 25 men in the room and the trimmings are trimmed out for sausage material and fat is transferred to the lard rendering.

Q. Now, Mr. McConkey, as this work is done, what happens to the hams?

A. The ham when it is finished goes through a [677] chute two floors below in the basement.

Q. When the ham is trimmed, what is done with the trimmings from the hams?

A. The fat trimmings are thrown in a truck and are removed to the rendering, the lard rendering.

Q. What happens to the sides of bacon, the bellies, as they are called?

A. Bellies also go by chute to the grading room in the basement.

Q. What happens to the picnics and the shoulder butts?

A. The shoulder butts are wrapped and placed on a dolly truck and removed to the sales cooler. The picnics go to the grading room also in the basement.

Q. And what happens to the loins?

A. The loins go through a chute to a room below.

where they are retrimmed, wrapped in paper, placed on shelf trucks and removed to the sales cooler.

Q. What about the spare ribs?

A. Go directly in the truck and transferred to the sales cooler.

Q. Now the trimmings that go to the sausage department, are they weighed?

A. Yes, sir.

Q. Is a record kept of the weight?

[678] MR. SELVA: If the Court please, we do not object to Mr. Goldman's testifying, if we might have the opportunity to cross-examine. All these questions are leading.

MR. GOLDMAN: If Mr. Selva wants to cross-examine me —

MR. SELVA: If you would like to take the stand, we would be happy to.

THE COURT: I think these last questions are leading questions.

MR. GOLDMAN: I will agree that they were, your Honor.

Q. Tell us what is done, Mr. McConkey, with respect to the trimmings.

A. Trimmings, when they are removed from the cutting room are weighed and put in a cooler adjacent to the sausage department where they are manufactured in various types of sausage.

Q. Is there any record of any kind made of the weight?

A. There is a transfer sheet made out daily of the product transferred from the pork department to the sausage department.

Q. How about the fats that go to the lard department? What happens to that?

A. They are weighed and entered on a sheet as [679]

the scale where they are picked up each day and go to the accounting department office.

Q. Now, with respect to the portions that go to the sales cooler, what happens to them?

A. I don't get the question, sir.

Q. With reference to the bellies, what happens to them?

A. The bellies are graded into different sizes for curing purposes and for sales, and are placed in cure, in curing vats for smoking.

Q. After they are graded into sizes, are they weighed at any time?

A. They are weighed, and the weight is recorded in what we call our stock book, and placed in vats.

Q. Does this weighing occur before or after the curing?

A. After.

Q. And they are graded in what categories?

A. Usually two-pound range; 10 to 12, 12 to 14, thusly.

Q. As I understand you, they are weighed after they are graded and put in their proper categories?

A. Yes, sir.

Q. How are they weighed?

A. They are placed in a truck and the truck is [680] pushed onto a scale and tares taken off for the weight of the truck, and the weight of the product in the truck is so recorded.

Q. There is evidence in this case, Mr. McConkey, that a number of entries are made in transfer sheets showing even numbers like 1400, or figures of that kind. How are those figures arrived at, if you know?

A. That is a general custom in the packing houses where they are vatting hams or bacon bellies for cure. They put a certain amount in each vat, and if they are putting in 1490 pounds, one piece one way or the other, if it is 1495, it is called 1500, if it is 1505, it is called 1500. They don't

use the odd weight. If it is a piece over-weight, they take a piece off, when they are vatting.

Q. When you say "they are vatting", are these quantities in these vats actually weighed?

A. Yes, sir.

Q. If I understand your statement, then, that vat, the weight is recorded to the nearest —

A. Nearest piece.

Q. Nearest piece?

A. Yes, sir.

Q. In round numbers?

A. Yes, sir.

Q. Now, with respect to the bellies, is the [681] same custom followed there?

A. In our case, no. We wouldn't as a rule. We would use actual weights on bellies. It would depend on what kind of cure. We have different kinds of curing and we wouldn't always use round numbers. We would at times.

Q. At times you would?

A. Yes, sir.

Q. Any part of the animal that may go in the tank at the cutting room, what happens to that with respect to whether it is weighed or not?

A. At one time, we were weighing everything. I am sure it was weighed. It is such a small amount, sometimes it is estimated, but most cases it is weighed.

Q. Now tell me, Mr. McConkey, with respect to the waste in the cutting room. Will you describe what waste there is and what it amounts to? I am speaking now of the waste that is not recovered, that is swept out or hosed out.

A. There is very little.

MR. SELVA: We object to the conclusion of the witness. If there is waste, there is waste, whether it is very little or very much.

THE COURT: Sustained.

Q. Rather than using the comparative term, like "very little", can you characterize it in some amount or [682] some proportion?

A. I would estimate it would weigh under 1/4 of one percent of the weight of the hogs that were cut that day.

Q. And of what does the waste consist?

A. Well, small scraps that would stick to the butcher's knife or maybe fall on the floor, things of that kind, small scraps.

Q. Now, Mr. McConkey, do you recall an incident along about the 11th day of September, involving William Harris, an employee of the Company?

A. Yes, sir.

Q. When you first came to Sucher Packing Company, September 1949, was William Harris employed there in any capacity?

A. William Harris and several others were working what we call "spot labor" or "temporary help", maybe two or three days a week, whenever we would have extra loadings or other general work to do. He was at the time with this group of men that we used.

Q. How long did he continue on this so-called spot labor work?

A. Several weeks before this incident he was put on as a steady employee, taking care of the rubbish and driving the rubbish truck, truck driver.

[683] Q. You recall James Jackson?

A. Yes, sir.

Q. Was he employed by Suchers, when you came there?

A. Yes, sir.

Q. Do you recall Robert Maiden?

A. Yes, sir.

Q. Was he employed —

MR. SELVA: I think the employment records would be the best evidence of this employment, if they want to bring them in.

MR. GOLDMAN: I have no objection to doing that.

MR. SELVA: You have had ten days.

MR. GOLDMAN: I have no objection to doing that.

Q. Now tell us, Mr. McConkey, what happened that you observed, on the 11th day of September, involving William Harris?

A. The truck that was used for removing rubbish from our plant was parked at our front dock and the rubbish was brought down from the various departments and emptied on the trucks. They were brought down in containers. Some were wood, some were fibre board and some were metal, and usually they were emptied scraps of paper and whatnot, were dumped right into the truck. Some wooden barrels had holes, or fibre board, when they got rather beat up, would be sent [684] on out to the rubbish. But this particular morning I noticed a new barrel setting in one corner of the truck with paper on it, apparently full of rubbish, and I thought it rather strange. So, I walked on the truck and examined the barrel and found it contained meat.

Q. Did you find any other meat on the truck in addition to what was in the barrel?

A. We looked around among the papers that were loose on the truck, and I found some other meat.

Q. What kind of meats were they?

A. In the barrel there were smoked hams and on the floor of the truck were fresh shoulder butts.

Q. What did you do?

A. I reported to my superior and had the meat re-

moved from the truck and Mr. Harris was sent to the personnel director and handled from there on.

* * *

CROSS EXAMINATION

[708] Q. You want to tell the Court and jury that in no instance that you know of, that no more than one ham would be added or taken away from a complete vat?

A. I don't know of it ever happening.

Q. Could be one or two hams, couldn't it, in a hundred hams?

A. I see no reason for it to happen.

Q. Would it be?

A. I have never known it to happen.

* * *

[725] Q. Do you know how many tons or pounds of rind are removed from bacon? In the slicing process in a period of a week, or would there be that much?

A. I have no record of it. We save that. As a matter of fact, we save everything but the squeal.

* * *

[732] Q. Your normal shrink here on smoked pork is marked at 1 and ½ percent of normal shrink. Can you tell me whether or not, in your judgment, that is a correct percentage of normal shrink on fresh pork?

A. Fresh pork?

Q. I beg your pardon, smoked pork.

A. That would be rather extreme. It should be a little under that.

Q. You think it should be under 1 and ½?

A. It certainly should not be any higher than that.

* * *

[745] **Testimony of Burton A. Davis**

DIRECT EXAMINATION

Q. State your name, please.

A. Burton A. Davis.

Q. What is your address, Mr. Davis?

A. 1060 North Main Street, Frankfort, Indiana.

Q. What is your business?

A. I am a management consultant, working for Food Management, in Cincinnati, Ohio.

Q. What kind of business does Food Management engage in?

A. We are industrial engineers working solely in meat packing houses.

Q. And for how many years have you been in that work?

A. I've been in that work going on seven years.

Q. For the same concern?

A. Same concern.

Q. Do you have any professional education qualifications?

A. I am a B.S.M.E., Purdue University; that is, mechanical engineering.

Q. As part of your work for Food Management, [746] have you made any studies in packing houses with respect to shrinks in pork products to be expected from evaporation, cutting, process, or other business causes?

A. As part of our work, we install standard costs systems. This involves standard yields and also we have to add on, at the same time, standard shrink of products. Our engineer on the job take tests and very accurately measure the shrink of products.

MR. SELVA. We ask the elaborate answer be stricken and the witness confine his answer to the question.

THE WITNESS: What was your question?

Q. Has your connection with the work involved study of shrinks?

A. Yes.

Q. In about how many meat packing plants have you made such studies that you can recall?

A. In approximately 20 different plants throughout the country.

Q. Mr. Davis, have you had an opportunity to see the Sucher Packing Company?

A. Yes, sir, this morning.

Q. Did you have an opportunity to visit the various parts of the plant, and see the operations as they went on, other than the cooling itself?

A. I saw three of the departments, processing [747] departments and all coolers where products were stored.

Q. Based on your observation of the operation at the Sucher Packing Plant, and assuming that the product goes through the plant in a 24-to a 36-hour period, with the exception of weekends when it would go over from Friday to Sunday evening or Monday morning, I will ask you, based on your experience, you are in a position to state what would be a normal shrink for chilling only from the hot dressed weight of the hog to its condition immediately after it was chilled, but before it is cut.

MR. SELVA: Object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Your Honor, may I submit there has been testimony that the conditions there today are substantially the same as they were during this period.

MR. SELVA: If your Honor please, we believe that the cooler shrink having been admitted by the plaintiff, in addition to other reasons, is not a subject of impeachment. They have stated a definite cooler shrink and

normal shrinkage in one instance, and this person would not be qualified otherwise.

MR. GOLDMAN: I think that is argumentative, your Honor.

THE COURT: Well, I think he can answer about the results of his experience in the industry.

[748] MR. GOLDMAN: I will rephrase the question.

Q. Based on your experience in the industry, Mr. Davis, what is the normal shrink to be expected from the hot weight, hot dressed weight of the hog to the chilled weight before the hog is cut?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. One and one-half percent.

Q. Is there a shrinkage that occurs due to loss of product during the cutting process?

A. Yes.

Q. And based on your experience in the industry, what is the shrinkage that occurs during the cutting process with respect to pork?

MR. SELVA: Object.

THE COURT: Overruled.

A. A maximum of one-half of one percent.

Q. What is the amount of shrinkage, if any, that occurs after cutting due to natural causes between the time the cutting is completed and until the time the fresh pork product is sold, based on your experience?

MR. SELVA: Object.

THE COURT: Overruled.

A. All plants throughout the industry use one percent.

[749] MR. SELVA: Move the answer be stricken.

THE COURT: I will sustain the objection. The answer may be stricken.

Q. Is that your experience?

A That is my experience.

Q What would you say would be a fair figure to use, based on your experience in the industry, for the total shrink from the hot dressed weight of the hog, until the fresh pork products are sold?

MR. SELVA: Object.

THE COURT: Overruled.

A Three percent.

Q With respect to smoked pork product, is there a shrink which occurs from the time the smoked pork product comes out of the smokehouse until the time it is sold?

A Yes.

Q Based on your experience in the industry, what is the amount of shrink to be expected?

MR. SELVA: I object.

Q What is the amount of shrink that occurs —

MR. SELVA: Object to that. Are you through with your question? I am sorry. You hesitated and I wanted to get my objection in.

MR. GOLDMAN: I am not through.

THE COURT: State your question, please.

750] Q (continued) — that occurs after leaving the smokehouse, the weight after leaving the smokehouse from the weight 3 to 4 hours after leaving the smokehouse, between that weight and the sales weight?

MR. SELVA: Object.

THE COURT: Overrule the objection, providing the witness knows this, of his own experience. Do you?

THE WITNESS: Definitely.

THE COURT: All right.

A One and a half percent, maximum of two percent.

Q With respect to sausage products, are you familiar with shrinks that occur in pressed sausage and smoked sausage?

A. Yes, I am.

Q. And based on your experience in the industry, what is the amount of shrink that occurs from the time after the sausage is produced, between that time and the time it is sold, with respect to sausage loaves?

A. 2 and ½ percent.

Q. And what, based on your experience, is the amount of shrink that occurs after fresh sausage is made until the time it is sold?

A. 1 percent.

Q. Based on your experience, what is the shrink [75] that occurs in smoked sausage from the time after it is made until it is sold?

MR. SELVA: Object.

THE COURT: Overruled.

A. 3 percent on wieners and 2½ percent on heavier bolognas.

Q. Would you mind naming some of the packing houses where you have made such studies to which you have referred?

A. Yes. At Merkel's in Jamaica, New York; at Trunz in Brooklyn; Albert F. Goetz in Baltimore, Maryland; at the Louisville Provision Company in Louisville, Kentucky; at Field Packing Company in Owensboro, Kentucky; at Stoppenbach Sausage Company, Jefferson, Wisconsin; at Gus Blazer Meats, Ft. Dodge, Iowa; at Mid-South Packers in Tupelo, Mississippi; at Lawton Meat Supply in Lawton, Oklahoma. That is all I can think of right at the present time.

Q. Over what area of the country does your firm operate?

A. Over the entire United States.

* * *

CROSS EXAMINATION

[754] Q. Did you actually weigh any product at the Sucher Packing Company this morning when it came out of the cooler?

A. No.

Q. So you don't know what their shrink is, do you?

A. Judging from my experience and from what I could see—observation I made, I can only judge what their shrink should be.

Q. It is an approximation, isn't it?

[755] A. It should be very, very close.

* * *

STIPULATIONS BY COUNSEL

[808] MR. GOLDMAN: Well, may it be stipulated that Helen Hurt was employed by the Sucher Packing Company beginning 11/27/47 until September of 1950.

MR. SELVA: Yes.

MR. GOLDMAN: And that Robert Maiden was employed at the Sucher Packing Company beginning May 8, 1947 and left the employment of the Sucher Packing Company in September of 1950.

MR. SELVA: Yes, we will stipulate that.

MR. GOLDMAN: That James Jackson entered the employment of Sucher Packing Company on the 26th of February, 1945 and left the employment of the company in September, 1950.

MR. SELVA: It is stipulated.

MR. GOLDMAN: And that Willie Early entered the employment of the Sucher Packing Company, the 3rd of July, 1950 and left in September of 1950.

MR. SELVA: It is stipulated.

Rulings of Court on Admission of Exhibits and Evidence

[809] MR. GOLDMAN: Like to offer in evidence at this time, reoffer in evidence, the weekly folders containing the supporting data for the product analysis sheets which are contained in these three boxes. Some of the information from various folders has been referred to witnesses during the examination, and I believe that for a fair presentation of the data, that they should be available to the jury for consideration.

MR. SELVA: No objection, if the Court please.

THE COURT: They may be admitted.

Thereupon three large cardboard boxes were admitted in evidence as **Plaintiff's Exhibits Nos. 16-A, 16-B and 16-C.**

* * *

[812] MR. GOLDMAN: In connection with the question of whether notice has been complied with, there has been a waiver of notice. I should like at this time to resubmit Plaintiff's Exhibit 10, which your Honor has seen previously, but perhaps your Honor might want to refresh your recollection from it. (Hands Exhibit 10 to the Court.)

THE COURT: I believe I sustained an objection.

MR. GOLDMAN: Earlier, your Honor. I thought in view of subsequent testimony, your Honor might rule differently at this time.

THE COURT: No.

* * *

[824] MR. GOLDMAN: We would now like to offer Plaintiff's Exhibit No. 18.

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I proffer Plaintiff's Exhibit 18.

* * *

Rulings of Court on Admission of Exhibits and Evidence

[825] MR. GOLDMAN: I will offer in evidence Plaintiff's Exhibit 19. * * *

* * *

THE COURT: Sustain the objection.
MR. GOLDMAN: I proffer Exhibit 19.

* * *

Testimony of Jerome Goldman

DIRECT EXAMINATION

[827] Q. Following the close of yesterday's session with respect to Plaintiff's Exhibit 6, did you instruct Mr. Hadeler to type up a new exhibit, eliminating the beef and veal items, not only physically from the exhibit but the figures and the totals based on beef and veal?

A. I did.

Q. Do you have the computation prepared under that instruction?

A. I do.

MR. GOLDMAN: I will have the reporter mark the same as Plaintiff's Exhibit 21.

Thereupon said document was marked for identification as **Plaintiff's Exhibit No. 21.**

MR. GOLDMAN: I offer the exhibit in evidence.

MR. SELVA: We wish to object to the exhibit, if the Court please, not because Mr. Hadeler is not here. I do not mean to use that as a reason, because he is available, but we do not believe that the exhibit is pertinent at this time.

THE COURT: I will overrule the objection.

Thereupon said document was admitted in evidence as **Plaintiff's Exhibit No. 21.**

* * *

[828] Q. In Plaintiff's Exhibit 21, have the beef and veal items been omitted?

A. They have.

Q. Have the totals, whether gains or shrinks, which appear in Plaintiff's Exhibit 6 for beef and veal, been taken out of the totals on Plaintiff's Exhibit 21 as compared to the totals as were contained on Plaintiff's Exhibit 6?

A. They have.

Q. What do the parentheses around the numbers mean where they appear on Plaintiff's Exhibit 21?

A. Those figures indicate gain or red figures. The Exhibit 21 was prepared on a duplicating machine which did not have red figures. So as to compensate for not showing red, the red figures instead are shown in parentheses.

Q. I call your attention to the fact that in Plaintiff's Exhibit 6 the total which included beef and veal of the column listed "unexplained losses for the 47 weeks ended October 22, 1949", was $104,183.82, whereas, on Plaintiff's Exhibit 21, even with the beef and veal [829] omitted, a total in the same column headed "Unexplained losses for the 47 weeks ended October 22, 1949" is $105,160, which is more than the figures for the same period when beef and veal were included. Is there an explanation for that?

A. There is.

Q. What is that explanation?

A. The explanation is in Plaintiff's Exhibit 6 an actual weight shrinkage was shown which was less than the computed normal shrinkage, giving rise to an estimated gain in beef carcasses which resulted in an estimated gain in

dollars, or in other words, it showed an increase in dollars. The figures in Plaintiff's Exhibit 6 were the net figures after subtracting all gains from shrinks and was the total of $194,183.82 was reached. However, when beef and veal were eliminated, the gain in beef being eliminated resulted in increasing the amount of the total. That is to say, the amount which had been subtracted as a beef gain, was no longer there to subtract and the result was that the total without that subtraction was greater than the net figure was before.

Q. I will ask you if the same situation was applicable to the 48-week period ended September 30, 1950?

A. No, because in that case beef and veal as shown on Plaintiff's Exhibit 6, both show excess shrinkage, [830] and therefore, there was no gain. So that when these figures were subtracted it reduced the original figure of $56,855.08 which was shown on Plaintiff's Exhibit 6 down to $48,192.43. The last figure at the bottom, right hand side, of Plaintiff's Exhibit 21.

Q. I will ask you if you prepared, at Mr. Pickrel's suggestion, or had prepared at Mr. Pickrel's suggestion, revised figures based on the results of Plaintiff's Exhibit 21 which shows the additional adjustments made by the Sucher Packing Company in reducing its claim to the present amount of the claim?

A. I did.

Q. I hand you what has been identified as Plaintiff's Exhibit 22 and ask you what that is?

A. Plaintiff's Exhibit 22 —

MR. SELVA: Have you offered it in evidence?

MR. GOLDMAN: Not yet.

A. Plaintiff's Exhibit 22 is a schedule showing in the first part of it, the figures in Plaintiff's Exhibit 21, there being added thereto the various deductions as stated by

Mr. Solomon, which were used in arriving at the final reduced claim in this case.

MR. GOLDMAN: I offer in evidence Plaintiff's Exhibit No. 22.

MR. SELVA: No objection to 22.

[831] THE COURT: It may be admitted.

Thereupon said schedule was admitted in evidence as **Plaintiff's Exhibit No. 22.**

MR. GOLDMAN: Will you pass copies of that to the jury?

(Thereupon Mr. Smith passed copies of Exhibit 22 to the jury.)

Q. How was Plaintiff's Exhibit 22 prepared physically?

A. It was prepared on a typewriter and for that reason in the case of Plaintiff's Exhibit 22 gains are shown in red figures, whereas, in Plaintiff's Exhibit 21, which was prepared on a duplicating machine, there being no red figures on the same, red figures are expressed instead with parentheses around them in the earlier Exhibit 21.

Q. Would you state what the various parts of the exhibit are?

A. The part of the exhibit to the left of the dividing portion, where two papers are joined together with a piece of tape or paste, is an exact duplication of Plaintiff's Exhibit 21, except for the fact that what is shown as figures in parentheses on Exhibit 21, are shown in red on Exhibit 22. To the right of that under the column headed "Deduction for meat used in employees' cafeteria", [832] are listed the credits about which Mr. Solomon testified for the estimated meat given to the employees' cafeteria for the two periods in question. The computations showing 2400 pounds at the average for fresh pork — at the average figure of 38372 which appears in the average selling price for

fresh pork, or a total of $920.93, for smoked sausage 2400 pounds at .40 cents for a total of $960.40, being slightly more than the average price of the various sausage figures included, making a total deduction for meat used in the Employees' cafeteria for the 47 weeks ended October 22, 1949, $1880.93.

The same figures were used for the next year, although the prices, selling prices as shown, were lower, but nevertheless the higher figures were used for the credit.

Then, in the second last column to the right, deduction for lost products in September, 1950, are the figures based on Mr. Solomon's statement as to the deductions that were made averaging the 48 week period and subtracting 3/48, so the figure $1749.81, is 3/48 of the total for the period in fresh pork; $1028.19 is 3/48 of the total for the period in smoked pork, and $234 is 3/48 of the total for the period in sausage.

In the last column on the right, which is headed "Net amount of loss after deduction for cafeteria [833] meat, last 3 weeks September, 1950", represents the net figures after subtracting from the last column called "Unexplained loss", right before the dividing pasting is done, subtracting from that deduction, so in the last column on the right, the net figures are reached, the figure of $56,755.64, being the original figure of $57,676.57, after subtracting the $920.93.

There is no change in the smoked pork figure because there was no deduction for the smoked pork, the testimony being that none was sent to the cafeteria.

Then, in the figures of sausage, the figure of $7842.52, in the last column to the right, represents the original figure of—and immediately to the left of the pasting, of $8802.52, less the $960.00 in the first deduction column. Then in the next figure below that, $103,279.07, for the total of the three figures above it

Then, for the second period the figures on the right represent the deduction, not only of the amount credited for meat sent to the employees' cafeteria, but the deduction for the (lost products) of September, 1950, subtracting those two amounts from the amount shown immediately to the left of the dividing pasting; again, there being no smoked pork sent to the employees' cafeteria, there is no deduction for that and there is only a deduction for the second period in the lower part of the [834] page for the last three weeks of September, 1950 of $1028.19, giving a net figure in the right hand column of $15,422.98.

And finally, under sausage in the lower part of the page from the figures immediately to the left of the dividing pasting, the figure of $960. and $234. are both deducted leaving $2550.22. Then the total for the second period of $43,299.50 appears in the right hand column and immediately below that is the total for both periods which totals $146,578.57, and below that is a deduction for payments that were withheld from Harris, Jackson, Maiden, Hurt and Early of $208. total, making the adjusted amount claimed in the lower right hand corner of $146,370.57.

* * *

Court's rejection of proffered testimony of Merica

[846] Court met pursuant to adjournment. Counsel being present as heretofore noted, the following proceedings were had out of the presence and hearing of the jury:

(Further arguments of counsel were omitted.)

THE COURT: I think the first question that is before the Court now is the matter of the admission of proffered testimony with reference to statements made by James Jackson. The Court has heretofore sustained an objection to the admission of that testimony. To that decision, the Court will adhere.

* * *

Ruling of Court on Plaintiff's Request To Examine Copies of Interrogations of McConkey and Hadeler

[915] MR. GOLDMAN: Also, at this time, your Honor, on the basis of Hickman v. Taylor, 329 U. S. 495, we should like to be permitted to see copies of the interrogations of Mr. McConkey and Mr. Hadeler, which were taken when I was not present. I believe, under the authority of that case, we are entitled to see them. We have requested of opposing counsel for permission to see them and they have been very indefinite about it.

THE COURT: I don't think this is any time to [916] raise that point.

MR. GOLDMAN: I thought we would make it before we got started, your Honor. May I renew it at the close of examination of the witness, your Honor?

THE COURT: I will give you an opportunity to make a request in the absence of the jury.

* * *

Testimony of Elliot Sachs.

DIRECT EXAMINATION

[920] A. The first column after a description of the item, says at the top "Opening Inventory" and that is set forth in pounds and dollars, and as I will explain to you later, the opening inventory figure is incorrect. The next column is "Purchases" which represents the quantity of product in pounds and dollars purchased by Sucher from outside sources. The next column is entitled "Transfers" and there is a word which is red in it. It means transfers in of product. In other words, this figure here I am reading now "Transfers In, fresh pork, 368,617 pounds", which is the same figure that was taken from the kill sheet which represents the killed dressed weight of the carcasses transferred into production for that week.

Now, chilled dressed weight, as has been [921] testified,

is the weight of the carcasses after it has come out of the chill room where it was placed at the time it was killed and that is known as the chill shrink, and has been seen on I believe it is Exhibit 6, in this instance at Sucher's is referred to as 3 percent.

MR. GOLDMAN: I object to this recitation, your Honor, as it contains conclusions of the witness from statements of what other people have testified to, rather than his own observation.

MR. PICKREL: He said that was on Exhibit 6, which you introduced, and Exhibits 21 and 22 which you introduced, all typed out.

MR. GOLDMAN: He is giving an interpretation on it which is different.

THE COURT: I will overrule the objection.

* * *

[925] THE COURT: You may proceed.

A. Well, on this sheet –

THE COURT: Which sheet is that?

THE WITNESS: The product analysis sheet.

THE COURT: That is, Exhibits 2 and 4?

THE WITNESS: That is right.

A. (Continued) The one I am holding is for the week ending January 21, 1950, and I might add that I have examined all of these product analysis sheets for the entire period involved here and they are the same. I take one example. That does not mean the others are different. They are the same type of paper, the same columns and same results. By result, I mean they include each one and shrink or gain column.

Now, on these sheets there is no column entitled "shrinkage" or "allowance for shrinkage". The shrink or gain column represents only figures showing the gain or loss in weight as a result of an arithmetical computation. It does

not represent shrinkage from process of cutting shrink or holding shrink, or any other type of shrink.

MR. GOLDMAN: I object to the witness stating the conclusion because the plaintiff's witnesses have testified that the 3 percent included that. That is argumentative on the part of this witness.

MR. PICKREL: No. This witness simply says this [926] sheet does not contain any figures for cutting or holding.

MR. GOLDMAN: I have no objection to his saying that it doesn't have a column headed that, but I do object to his conclusion.

THE COURT: Overruled.

* * *

[931] A. For the week ended May 7, 1950, there were a total of 27 transfers. There was 26 in round numbers. That is again in hams and bellies, 27 total. The total transfers in round figures would be 26, and by weight, the total transfers in pounds is 36,945, and the total transfers in round numbers was 35,900.

For the week ended May 27, 1950, there was a total of 43 transfers or 38 in round numbers. The total pounds transferred again limiting it to hams and bellies, and I have done that only for the reason there was far more [932] activity in hams and bellies than in shoulders or callies. Repeating—I am not sure I mentioned it—the total of 43 38 in round numbers, total pounds in hams and bellies 58,500 and 53,200 in round figures.

Q. Now this is inaccuracy—

MR. GOLDMAN: Object to the characterization, Your Honor, that is a matter of dispute.

MR. PICKREL: Well, to this witness it is an inaccuracy.

THE COURT: I will ask counsel to address all remarks to the Court, and not get into arguments between themselves. Mr. Goldman has made an objection.

MR. PICKREL: May I speak of that objection, if the Court please? This witness has testified as to the kind and character of plaintiff's –

THE COURT: May I interrupt? The witness has testified there was an error. Call them errors.

Q. These errors to which you testified, that have arisen in the manner you have indicated, what effect do they have on both – what effect did they have on the source from which they came and the items which go out?

A. They would affect the weight of the product transferred, which is shown in inventory, and they would affect the weight of the product from which it was transferred, specifically in this instance, the fresh pork. [933] So if you have an incorrect factor, in other words, the transfer out, taking something out and supposed to have something left, but if my figure of the part I am taking out is incorrect then the figure of what I have remaining is incorrect. And that is what has happened here.

MR. GOLDMAN: Object to the conclusion of the witness, your Honor. It is all based on his conclusions, it is an error. He has not weighed any of the items.

THE COURT: Overrule the objection.

* * *

[957] Q. What, if any, investigation did you make accordingly, on beef and veal?

A. I examined records relating to beef and veal at the Sucher Packing plant.

Q. Did you examine the records on beef and veal otherwise attached to this yellow sheet?

A. I did.

Q. Part of Exhibits Nos. 2 and 4. Tell the jury, what, if any, difference there is in the system of calculating the progress of beef and veal through the plant than from the progress of pork?

4

MR. GOLDMAN: I object, your Honor, on the ground beef and veal having been withdrawn. No matter what was done with beef and veal, it is immaterial.

THE COURT: I will overrule the objection.

A. There is no difference whatever in the accounting process involved, with respect to beef, pork or veal. In this connection, however, the portion —

THE COURT: Don't volunteer anything.

Q. Well, as compared to the variations of pork, in comparison with the variations on beef and veal, what can you say?

A. Well, as shown on the weekly product analysis sheet, there is much more data contained with respect to pork, because of the number of processes shown on these [958] sheets, than there is for beef and veal.

Q. What can you tell the jury as to the number of various products that come out of pork as compared to those that come out of beef and veal?

A. The analysis sheets themselves, the product analysis sheets themselves have a page devoted to pork only, beginning with the live hogs, pork offal, fresh pork, lard, cured hams, picnics, bellies, other, smoked hams, bellies, skinned bellies, smoked picnics, smoked other, sliced bacon, B. B. hams, raw and finished, and having total processed pork and total for the pork department. Those are the listings on these product analysis sheets.

Q. How many products come out of pork? Tell us that.

A. Quite a number.

Q. Add them up? Look at that sheet and tell us how many different things they make out of a hog carcass.

A. There would be about two types of cured products, two types on the sheet of smoked products, skinned bellies, about half dozen kinds of smoked products and bacon.

Q. Add them all up. Don't break them down. How many total different kinds of products come out of pork?

A. 14.

Q. 14, how many come out of beef and how many come out of veal?

[959] A. Two come out of veal, not counting offal.

Q. How many?

A. Three.

Q. How many out of beef?

A. Four.

Q. Did I request you to prepare a chart on lard sales for the first month of the first period, the first month of the second period and the second month of the second period?

A. You did.

Q. And did you prepare the same?

A. I did.

MR. PICKREL: May I mark it as an exhibit, please?

Thereupon said chart was marked for identification as **Defendant's Exhibit W.**

Q. What is this document that I hand you marked as Defendant's Exhibit W?

A. This is a listing of lard sales by weight and amount covering a period of 16 weeks, specifically, December 4th — these are weeks ended — December 4th, 11th, 18th and 25th, 1948; October 1, 8, 15, 22 of 1949; also November 5, 12, 19, and 26 of 1949; and August 19, 26, September 2, 9, 1950, which I prepared from the product analysis sheets which show lard sales and I have two columns covering weight in pounds and dollar amount, that is, the sales in dollar amount, [960] as well as the weight, of course.

Q. You have added these all up. All right. Let's take them by periods. This first four weeks, first period, how much lard did they sell in pounds?

A. 198,048.

Q. I take it, you took all these figures from where?

A. From the product analysis sheets.

Q. Furnished by whom?

A. By the plaintiff. That is Exhibits 2 and 4. Plaintiff's Exhibits 2 and 4.

Q. And in the first four weeks they sold 198,048 pounds and received how much?

A. $41,275.13.

MR. GOLDMAN: Your Honor, I don't know what relevance lard will have to the claim. It has never been included in the claim.

THE COURT: Overrule the objection.

MR. GOLDMAN: Exception.

Q. Without asking on each one, just give the totals, give the weeks and the totals in pounds and dollars for the other periods, slowly and distinctly, so I can hear it.

A. For the four weeks of October, 1949, total weights sold, 220,966 pounds, for which they received, [961] according to the product analysis sheet, $36,124.57; for the fourth week of November, 1949, the weights sold was 208,206 pounds for which the sum of $29,178.16 was received; for the last two weeks of August and first two weeks of September of 1950, which represents the last four weeks of the second claim period, the total sold was 209,324 pounds, for which the sum of $38,944.33 was received.

Q. Now is that all the lard in pounds or dollars that they sold during these two periods?

A. This particular schedule refers only to the four weeks mentioned.

Q. Is that all that they sold during the entire period?

A. No, sir.

Q. Where do you find other sales reflected?

A. On each product analysis sheet.

Q. But you just added up those that I asked you about.

A. That is correct.

Q. Thank you. You testified that you had examined quite a few of the product analysis sheets. Those are Exhibits 2 and 4, which, by the way, are in two large packages here. You have testified that you have examined probably not all, but quite a few of these product analysis sheets, Exhibits 2 and 4, and the transfers sheets and the [962] inventories, and I hand you Plaintiff's Exhibit 6 for your inspection, which was introduced through Mr. Hadeler, and I likewise hand you Plaintiff's Exhibits 21 and 22, copies of them, heretofore introduced by Mr. Goldman as a witness — trying to get a witness fee out of this case — where on any of these papers, Plaintiff's Exhibits 2 and 4, all of those, all of the transfer sheets that you have looked at, all the inventory sheets that you have examined, Plaintiff's Exhibit 6, the account on which this suit is based, Plaintiff's Exhibits 21 and 22 introduced here — where, on any of them do you find a single figure concerning lard sales?

A. No time.

Q. None of them, is that right?

A. That is correct.

Q. On Plaintiff's Exhibits 2 and 4 for each week, what do you find, information as to whether or not Suchers sold lard?

MR. GOLDMAN: I would like to hear the previous question.

THE COURT: Read the question and answer.

(Thereupon the last several Q's and A's were read by the reporter.)

Q. What do you find, if anything, on Plaintiff's Exhibits 2 and 4, the weekly sheet, concerning lard sales?

A. There is a line referring to lard.

[963] Q. But on the sheets that support the alleged claim on which this suit is brought, Plaintiff's Exhibit 6, Plaintiff's Exhibits 21 and 22, what, if any, credit do you find for any lard sold, either in pounds or dollars?

A. None.

MR. GOLDMAN: I object. It is not intended to include such items.

THE COURT: Overruled.

MR. GOLDMAN: Exception.

• • •

[972] Q. Where, if at all, on all this great multitude of papers plaintiff brought in here, do you find any statement of any kind of any officials, employees or counsel of sucher Packing Company as to any loss by shrinkage, mistake or theft?

A. Nowhere, except in connection with the original chilling shrink.

• • •

[973] MR. PICKREL: You have told us all about it.

MR. GOLDMAN: Not on the paper.

THE COURT: You talked about the same thing and called it something different.

MR. GOLDMAN: The witness is arguing that certain things mean chilling shrink. He says it is in the papers. It is not. I examined the papers during recess.

THE COURT: He testified to shrink, regardless of what it is called.

MR. GOLDMAN: Our witnesses say it is something different than what he says.

MR. PICKREL: Your witness typed it right on this paper, Plaintiff's Exhibit 6.

MR. GOLDMAN: Mr. Smith and Mr. Solomon both testified what that means. He is describing the meaning.

MR. PICKREL: No. I beg your pardon. He simply reads English which anybody can.

Q. So, that, other than Note No. 1, which says 2 percent shrinkage is the allowance for cooler shrinkage, other than that statement, which likewise is found on 21 and 22 prepared by Mr. Goldman, were in all the papers, and all [974] the bosses and all the other, do you find any statement pertaining to calculations of shrink, corrections of errors or theft?

A. Nowhere.

* * *

[980] Q. Now, I am going to ask you to call off some figures, and, Mr. Selva, if I could bother you, you old school teacher, to write them down. I will ask you with what amount of fresh pork we began the first period with which the defendant is charged?

A. In a column entitled "Carcass Weight Processed Pounds", the amount is 9,758,144.

(Mr. Selva puts figures on black board.)

Q. Now, as against that, they report certain sales. So, we will put these now in a little separate column over to the right. Put these credits down as he calls them. How many pounds did they say they sold of fresh pork?

A. 3,970,944.

Q. And how much smoked pork did they sell out of this 9 million pounds?

A. 2,683,782.

Q. And how much sausage do they report that they sold in pounds of this 9 million?

A. 2,237,842.

MR. PICKREL: Now, Mr. Selva, if you will add those real quickly, you will find they amount to 2,683,782, according to Mr. Goldman's figures, which, I am sure, are [981] correct. Rub that out. I gave you the wrong figures

Can't blame Goldman for that. I will read you the figure now, 8,892,568 pounds.

(Mr. Selva puts on blackboard.)

MR. PICKREL: Now, that is the figure so far on what we start with and what has been sold.

Now, do you find any other figures on that exhibit you have that are charged against the defendant?

A. There is a column entitled "Excess Shrinkage in Pounds".

Q. What is the total of that?

A. 265,657.

MR. PICKREL: Now, you will have to add that yourself. Mr. Goldman and I can't help you on that.

(Mr. Selva adds the figures on the blackboard.)

Q. Do you find any figures in pounds that indicate any charge against the defendant in this case?

A. Not in the first period.

MR. PICKREL: Now, if you will, please, Mr. Selva, deduct the total credit from the total charges.

(Mr. Selva does as Mr. Pickrel requests.)

MR. PICKREL: Now, there is 599,919 pounds of pork, the difference between the amount charged and the amount credited by the various sales plus the claim of an excess charge.

[982] Q. Do you find on that bill, or that exhibit that is in your hand any place to account for that 599,000 pounds?

A. I do find, sir, that part of it would be accounted under the titled column "Normal shrinkage".

Q. My dear sir, the normal shrinkage is taken away from weight shrinkage, which leaves the excess shrinkage?

A. That's correct.

Q. Sure. Then why bring that in? Do you find any place where this 599,000 pounds are accounted for on that bill?

MR. GOLDMAN: I object to Mr. Pickrel's asking the witness why he brings that up.

MR. PICKREL: I can't argue with Goldman. I can't argue with the witness. I will wait until I get home. I didn't mean to argue with him. I was just calling his attention.

THE COURT: Well, it may be stricken from the record.

MR. PICKREL: All right.

Q. Now, I will ask you again, do you find anything else in the way of sales or other charges, such as the 265,000 that appear on that bill that you have in your hand that would account for that 599,000?

[983] A. No.

Q. All right. Let's take the second period. What is the total amount of pork charged to the defendant in the beginning of the second period?

A. 17,069,507.

Q. Now that is the total charge. Now, they say they had some sales. How much were the sales in pounds? Of fresh pork?

A. 10,361,164.

Q. And they tell us about some sales of smoked pork.

A. That is 2,699,325.

Q. And they tell us about the sales of sausage. What did it amount to?

A. 2,160,409.

MR. PICKREL: I think, Mr. Selva, Mr. Goldman and I can agree that those three big figures total 15,220,898.

Q. Now, do you find an excess shrinkage item on this bill presented by the plaintiff against the defendant for the second period?

A. I do.

Q. If so, how much?

A. 137 –

MR. GOLDMAN: Your Honor, I object to [984] the characterization as a bill.

MR. PICKREL: Very well.

A. 137,659 pounds.

MR. PICKREL: Then, if you deduct that total from 17 million with which we are charged, and the difference is 1,710,950. Thank you very much.

Q. Do you find any place on that exhibit or account or bill, whatever you call it, that you have in your hand, which is Plaintiff's Exhibit 21 introduced by Mr. Goldman, any explanation of this shortage or any figures that might account for the shortage of 1,710,000 pounds?

MR. GOLDMAN: I object to the characterization as shortage. It is a difference, but not shortage.

MR. PICKREL: I am not going to argue about words. We will call it a difference, to have peace and happiness.

Q. Do you find any figures that would account for that difference of 1,710,000?

A. No, sir.

* * *

CROSS EXAMINATION

[996] Q. Are you familiar with the provisions of the policy that require the claimant to cooperate with the insurance company?

A. In general.

Q. It was not your purpose, when you went to the Sucher Packing Company, to give any cooperation to the Sucher Packing Company?

MR. SELVA: Now, if the Court please, we object to that.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Doesn't that go to the witness' bias?

THE COURT: It does not call for argument.

MR. GOLDMAN: Note exception, please.

Q. Isn't it true, Mr. Sachs, when you went to the Sucher Packing Company, your purpose in going there was to go over their records and find anything you could which you thought would help to beat their claim; isn't that right?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

MR. GOLDMAN: Exception, please. I do not wish to counter the ruling of the Court. I wonder if I could speak to the Court? I don't want to appear to be repeating the [997] same subject after the Court has ruled. May I approach the bench?

THE COURT: On that question, I don't think it would be necessary. I don't think that question, or any like it, would be proper.

* * * *

[1002] Q. And you could have determined over that two weeks that you spent out there, had you chosen to stay longer, you could have found out just how many dressed hogs were sold from the sales records during the two periods in question, could you not?

A. I have no idea.

Q. You never made an effort to; is that right?

A. That is correct.

Q. You were advised, however, were you not, that there was a very substantial amount of sales of dressed hogs during those two periods?

A. I was told some dressed hogs were sold.

Q. But you didn't feel it necessary or important for you to determine how many were sold; is that right?

A. It was not part of the program which I had when I went out there, and which I developed while I was there.

Q. You made no effort to find out how many [1003] dressed hogs were sold?

A. That is correct.

* * *

[1004] Q. Now, Mr. Sachs, you did not advise anybody at Suchers that in addition to being an accountant, you were also a lawyer, did you?

MR. SELVA: Object.

THE COURT: I didn't get the question.

(Thereupon the last Q. was read by the reporter.)

THE COURT: I will sustain the objection.

MR. GOLDMAN: Exception.

* * *

[1007] Q. Coming back to the dressed hog sales, Mr. Sachs, when a hog is sold dressed, there is no cutting operation on that hog, is there?

A. No. So far as I know, that would be true.

Q. Therefore, there would be no cutting shrink of any kind with respect to the dressed hog, would there?

A. So far as I know.

* * *

[1022] Q. Based on the assumption, just the mathematics of it, you, as an accountant, not on your knowledge of facts, just on your experience as an accountant, isn't it a fact accountingwise, that if you take a percentage of the weight of the total hog and apply that percentage of the weight of the total hog to fresh pork cuts which constitute approximately only one-third of that total weight, with respect to that one-third of the weight, that percentage is, in effect, multiplied by three?

[1023] MR. PICKREL: May we offer this objection: That is on the theory that they were only going to have anything to do with one-third of the hog. The balance of the hog is all there. It goes for some purpose and,

therefore, the entire hog takes the percentage just the same, whether it goes into ham or trim or fat or even lard, eventually. But it doesn't go into all these things the first day, and so the entire hog takes the shrink, not just 31 percent of the hog takes the shrink. For that reason, we object to the question.

MR. GOLDMAN: The question is based on facts that are in the case, from which arguments can be made later.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Have I restated it wrong? Your Honor admitted the previous question. I was trying to say the same thing again. Maybe I didn't say it the same way. I don't know.

THE COURT: I think the question is involved, for one thing. It poses a hypothetical question to this witness about distributions there. This witness testified from records here.

MR. GOLDMAN: I want to ask him as an expert what happened. He has been put on as an expert. I don't want to have it based on his knowledge of any particular fact. It is a hypothetical question. Would your Honor permit me to [1024] ask a hypothetical question on accounting?

THE COURT: No.

* * *

[1026] Q. My question to you was, that it is a fact, is it not, that for the purpose of this claim that plaintiff has credited a total shrink in fresh pork from hot weight to sale of somewhere between 300 and 350,000 pounds?

MR. SELVA: We object.

THE COURT: Overrule the objection.

A. On the basis of the figures shown on this sheet, that is correct.

Q. And isn't it true that for the second period the

plaintiff has credited a total shrink against the claim from hot weight to sale of somewhere between 560,000 and 600,000 pounds?

MR. SELVA: Object, if the Court please, because on this exhibit we are talking about carcass weight. I don't know what hot dressed weight is.

MR. GOLDMAN: The witness has testified concerning it, your Honor.

MR. SELVA: If the question is ambiguous, without giving the witness the hot dressed weight—this is the first time that has been mentioned. We would like to know what the hot dressed weight is alleged to be.

[1027] THE COURT: He can answer, if he can.

A. I haven't computed it.

Q. Well, will you take a moment and compute it, please?

A. What was the figure you had, Mr. Goldman?

Q. In the second period—

A. Yes.

Q. (continued)—is credited against—in shrinkage, from hot weight to sale, of between 560—I will change that, now after I made a little computation myself. Of between 590,000 and 600,000 pounds; isn't that correct?

A. I imagine it would be, approximately.

Q. It is approximately correct?

A. I imagine so. I haven't checked it right out.

Q. So it isn't true, is it, that in computing a claim that the plaintiff has made no credit for shrinkage?

MR. SELVA: Now, if the Court please, we object to that question because, again, counsel misquotes the evidence. The witness testified he could find nothing in the records, weekly production analysis sheets. Now counsel attempts to ask another question entirely, and it is improper. We object.

THE COURT: I will sustain it.

MR. GOLDMAN: That is not what the witness said. [1028] Mr. Pickrel read him a long list of documents including Plaintiff's Exhibit 6.

MR. PICKREL: Now, if it please the Court, that is absolutely incorrect. I asked him about the weekly analysis sheets, those long, yellow sheets.

MR. GOLDMAN: My recollection is—I think the record is the only way to prove it.

MR. PICKREL: Oh, well—

MR. GOLDMAN: Rather than have a further argument about it, we will proceed to something else.

Q. Regardless of what was said before, Mr Sachs, based on all the papers, including Plaintiff's Exhibit 6, which was sent to the insurance company, there was a shrinkage credited from hot weight to cold, for the first period, first 47-week period, of somewhere between 300,000 and 350,000 pounds, and during the second period of somewhere between 590,000 and 600,000 pounds; isn't that correct?

MR. PICKREL: To which we object, if the Court please, because counsel again attempts to get in all the papers, and the only place that any alleged credit is shown is on Plaintiff's Exhibit 6, which is an arbitrary selection.

THE COURT: I will sustain the objection.

Q. The computation could have been made by the insurance company, had they chosen to do so. It is a fact that from Plaintiff's Exhibit 6, copy of which they received, [1029] that the plaintiff, Sucher Packing Company, was allowing a shrink for the first period of between 300,000 and 350,000 pounds in fresh pork from hot weight to sale, and in the second period in fresh pork from hot weight to sale of between 590,000 and 600,000 pounds.

MR. SELVA: We object. We are getting back into live weight.

MR. GOLDMAN: I didn't say anything . out live weight.

MR. SELVA: We wish to object without pursuing the argument.

THE COURT: I will sustain the objection because I think the question is a double – or triple-barrelled question that I think you are working to the document he has in his hand. Ask him what that shows.

• • •

[1034] Q. At any rate, Mr. Sachs, it is a fact, is it not, that in Plaintiff's Exhibit 6, which is Mr. Hadeler's original computation for the first period, a total of 100,219 pounds in shrinkage was allowed against sausage; isn't that right?

A. On the basis of the percentages you used.

Q. Isn't that correct?

A. That is correct.

Q. And isn't it also correct, that for the second period a total of 97,121 pounds of shrinkage was allowed against sausage?

A. It is included on this exhibit.

Q. That is there?

[1035] A. That's right.

Q. Been on Plaintiff's Exhibit 6 all along, has it not?

A. Since it has been in evidence, Mr. Goldman.

Q. So far as you know, that was on the exhibit that was submitted to the bonding company, correct, is it not?

A. I have no information to the contrary.

• • •

[1037] Q. Then you didn't mean to intimate by your answers to any questions that Mr. Pickrel may have asked you, to which you have said there was no shrinkage allowed, you didn't mean to intimate by your answers that as

far as this claim is concerned, plaintiff was not allowing any shrinkage, did you?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection.

Q. Mr. Sachs, you testified on direct examination as a result of your answers, Mr. Selva put certain figures on the blackboard. Isn't it a fact, Mr. Sachs, that these computations contained on the blackboard have nothing whatever to do with the claim in this case, insofar as its affecting its validity?

A. I can't answer that.

MR. SELVA: We object.

Q. You don't think it has, do you?

A. Every figure has something to do with the claim.

Q. You don't believe, do you, that the figures put on the blackboard are helpful in any way at arriving at whether the claim is correct or not?

MR. SELVA: We object.

THE COURT: I will overrule the objection.

[1038] A. This is a claim of inventory shortage, Mr. Goldman.

Q. Answer my question yes or no. If you wish to explain it, explain it afterwards.

A. I would say it could be related to the claim.

Q. You don't believe it would, do you?

MR. SELVA: We object.

MR. GOLDMAN: I have a right to go into the good faith of the answers.

THE COURT: I will overrule the objection.

THE WITNESS: May I explain my answer?

MR. GOLDMAN: First answer, and then explain.

THE WITNESS: May I have your question again?

Q. You don't believe that these figures are helpful in arriving at whether the claim is correct or not?

A. From an accounting standpoint, I believe they are.

Q. You do?

A. I do.

* * *

[1045] Q. Mr. Sachs, you did say—you did say, that you checked every product analysis sheet against Mr. Hadeler's computation to be sure his computation was correct? Did you not?

A. I did, and I can explain my answer in this respect. Mr. Hadeler's schedule contained certain specific items and I checked these product analysis sheets to see whether the totals, or week-by-week items agreed with Mr. Hadeler's tabulation.

Q. You also took off of each product analysis sheet certain inventory figures for fresh pork and for smoked sausage, did you not?

A. I did, and I will explain my answer about that, too.

Q. You did, didn't you?

A. I did. The reason for taking those totals off was to show the amount in quantity and weight of fresh pork, or smoked sausages, on hand on a given date, to show that this product—I believe the figure for one period was 255,000 pounds of smoked sausage remained in the plant for at least two additional days, and that was the exact reason I did the same thing with respect to fresh pork.

[1046] Q. Regardless of your reason, you did it?

A. I did it.

Q. Now you also said that you examined a great many, although not all, of these weekly folders. Wasn't that your testimony?

A. Yes, sir, and I can explain that, too. The word "examine" is a broad word. When you go through a file which has perhaps hundreds of papers, you look at some

you test others and you may disregard some, but the word "examine", as I say, is a very broad word.

Q. Now, Mr. Sachs, you were interested in determining whether the product analysis sheets had errors in them in copying, weren't you?

A. I was.

Q. And you were also interested in determining whether there were errors in addition, were you not?

A. That's correct.

Q. And one of your purposes in checking through the folders and in checking the product analysis sheets, was to satisfy yourself that the product analysis sheets, to the extent that you examined them, as against the folders, contained the totals in the transfers as shown in the transfer sheets correctly, to the extent that you examined them?

A. That is correct, and I explain that further. [1047] Mr. Goldman, I did not check back further into the amounts shown on the transfer sheet.

Q. I am not asking you about that. I am only asking you whether the totals shown on the transfers sheets, to the extent that you checked them against the product analysis sheets, were the same?

A. In those instances in which I checked them, they were the same.

Q. At any rate, since one of your purposes was to see if there were any errors in copying figures from transfer sheets to the product analysis sheets, you examined a sufficient number of them to satisfy yourself that a further check was unnecessary, isn't that correct?

A. That is correct, with an explanation, Mr. Goldman. "A sufficient number" again is an elastic term. [1048] I had a certain time in which to do certain things, and I had, in addition to the question of checking fresh pork and

sausages and smoked meats, I was also there to check beef and veal, which were originally included in this claim.

Q. Well, at any rate, you satisfied yourself in the check that you made a further check was unnecessary?

THE COURT: That is repetition of what you just asked him.

MR. GOLDMAN: Well, I think his explanation, your Honor—I don't think it was much of an explanation. That is why I wanted to go back. Very well. What he said is in the record.

Q. Now, Mr. Sachs, if the transfers to lard, as shown on the product analysis sheets, are the same as the transfers shown on the transfers sheets, then the product analysis sheets will show all transfers of lard that are shown on all transfer sheets, is that correct?

MR. PICKREL: To which we object.

THE COURT: Sustain the objection.

MR. GOLDMAN: May I ask, your Honor, why I can't go into that?

THE COURT: Well, I think it is argumentative. It asks the witness for a conclusion which you can argue at the proper time.

MR. GOLDMAN: He has stated the conclusions, [1049] your Honor, and I wish to test them.

Q. Now, it is a fact, is it not, Mr. Sachs—

THE COURT: Just a minute. I sustained the objection.

MR. GOLDMAN: I'm asking him something else.

THE COURT: I thought you said "that is a fact."

MR. GOLDMAN: No, I said "it is a fact". Starting another question.

Q. It is a fact, is it not, Mr. Sachs, that the product analysis sheets, if they reflect the transfers as made to

lard, will show what happened to the fresh pork insofar as lard is concerned?

MR. PICKREL: To which we object. They speak for themselves. That is the same question.

THE COURT: I will sustain the objection.

MR. GOLDMAN: May I address the Court, your Honor? What I am trying to develop is to test the witness' conclusions stated yesterday. I don't want to argue in the presence of the jury.

THE COURT: No. I don't think that is necessary.

* * *

[1052] Q. Didn't you check the transfers-out to lard, Mr. Sachs?

[1053] A. I say, in my examination of these weekly holders, certain transfers of cutting fats. I didn't examine them because they were not included in this claim and, as I recall, they also were in round numbers.

Q. They were not included in this claim, that is correct, is it not?

A. On this sheet Exhibit 6—

Q. Just answer my question. The answer can be yes or no and if you have an explanation, add it.

MR. GOLDMAN: Would you read the question to the witness?

(Thereupon the last Q. was read by the reporter.)

A. My answer is no, and I will explain it, Mr. Goldman. The claim as such, as I understand it, appears on Plaintiff's Exhibits 6, 21 and 22, and on these sheets that you have before you, too, I find no reference to lard.

Q. So, they are not included in this claim—lard is not included in the claim?

MR. PICKREL: To which we object. He said it does not appear on the sheet. Whether it is included in the claim in some other way, we don't know.

Q. To your knowledge Mr. Sachs, there is no lard included in this claim?

MR. PICKREL: To which we object. The paper has been introduced and sets out the claim and it speaks for [1054] itself.

THE COURT: He may answer, if he can.

THE WITNESS: Read the question, please, Miss Fischer.

(Thereupon the last Q. was read by the reporter.)

A. I find no reference to lard upon Exhibits 6, 21 and 22.

Q. And to your knowledge, there is no lard included in the claim; is that correct?

A. So far as I can say, Mr. Goldman, the claim is in these Exhibits 6, 21 and 22.

* * * * *

[1055] Q. What experience have you had in packing houses?

A. I have examined other claims involving packing houses.

Q. How many have you examined?

A. Two or three, perhaps. But I don't recall.

Q. Two or three. Now Mr. Sachs don't you know that the final lard product involves rendering the fats that go into it?

A. I've heard it, Mr. Goldman.

Q. And the quantity of the lard that may be sold will be considerably different from the quantity of fat [1056] going into the product, as raw material; isn't that a fact?

MR. PICKREL: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: Your Honor, I would appreciate it if I might address the Court on the subject because I think

I wish to attack the witness' conclusions and I would like to lay some foundation for it.

THE COURT: The last question before me was a statement which could be obvious not at all what the witness testified to, and I think the objection is well taken.

MR. GOLDMAN: May I state my purpose in these questions, your Honor?

MR. SELVA: May it please the Court —

THE COURT: No, I don't think that is necessary.

* * *

[1059] Q. That being the case, Mr. Sachs, subtracting sausage which includes beef, from fresh pork, doesn't it give you a result which has much meaning, has it?

MR. PICKREL: To which we object.

THE COURT: I will sustain the objection.

Q. If it be a fact, Mr. Sachs, that the end lard product is substantially different weight from the raw materials making up the lard, using the end lard product, would have no effect — strike that. — wouldn't be helpful in determining the fresh pork item, would it?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: May I ask your Honor what my trouble was with that one?

THE COURT: Well, it is an endeavor to draw a conclusion from the witness which you, yourself, can draw at the proper time from the facts that are in the record, and that have been testified to.

MR. GOLDMAN: Your Honor, yesterday (I) made such a conclusion with respect to these figures. I am attempting to show that these figures have absolutely no meaning whatever.

MR. SELVA: May it please the Court, if Mr. Goldman [1060] insists on arguing each motion, may we have the

argument in the absence of the jury, or engage in equal argument?

MR. GOLDMAN: I have no objection to having it in the absence of the jury.

MR. SELVA: Either way, we would like to reply.

THE COURT: Mr. Goldman, the objection is that you attempt to make your argument as you go on with the witness; draw conclusions which you, yourself, may draw at the proper time for the benefit of the jury from the figures and from the facts testified to. Please proceed.

* * *

[1064] Q. It is true, is it not, from your examination and from whatever source you may have gained it from, whatever source you may have gained it, that the weight of smoked pork after having gone through the cure and smoking process, is substantially different from fresh pork?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

* * *

[1065] Q. Now, let me ask you this question: To the best of your knowledge, you believe, do you not, that the weight of the smoked pork coming out of the smokehouse, is [1066] different from the weight of the fresh pork making up that smoked sausage?

MR. SELVA: We object.

MR. GOLDMAN: I asked this witness yesterday whether he believed that this figures had any bearing on the case, and after some hesitation he finally said he did believe it. I am going into his belief to attempt to show he –

THE COURT: I will sustain the objection.

MR. SELVA: May we ask the Court to instruct the jury to disregard the remarks of counsel during argument?

THE COURT: The jury may disregard the remarks of counsel.

* * *

[1068] Q. You don't mean to say, however, Mr. Sachs, that subtracting smoked pork after it has gone through the [1069] process of curing and smoking, and subtracting sausage which has beef in it and spice and other items, gives you any result that can tell you what has happened to the fresh pork?

MR. SELVA: We object.

THE COURT: Sustain the objection.

* * *

[1072] Q. Now, you say that you prepared Exhibit W which shows lard sales for certain months of the year.

A. That is correct, and I want to explain. I was requested by Mr. Pickrel to furnish him with the pounds and amount received by the plaintiff for lard sales during 16 specific weeks, which I did, taking the information solely from Plaintiff's Exhibits 2 and 4, which are the product analysis sheets.

Q. And as far as you know, however, this information of the final lard product as sold for certain isolated periods was nothing that you considered as having any probative value one way or the other as to this claim?

MR. SELVA: Object.

THE COURT: Sustain the objection.

MR. GOLDMAN: I would like to ask a different question. May I suggest it to you in advance so I won't run into any accusation of my attempting to ask the same [1073] question over again?

THE COURT: In a different way stating the same thing?

MR. GOLDMAN: I think it goes a little beyond that, your Honor. I don't want to appear to be ignoring the ruling of the Court.

THE COURT: Well, ask the question.

Q. It is a fact, is it not, that the figures on Exhibit W, lard sales, do not help determine one way or the other the merits of this claim?

MR. SELVA: Object.

THE COURT: Sustained.

* * *

[1075] Q. If it be a fact, Mr. Sachs, that hams and bacon in their respective categories and classifications, or grades, were actually weighed in carts, that they were then placed in vats designed to hold 1400 or 1500 pounds, or 1600, depending on the size of the vats, and they were [1076] filled from these carts which were actually weighed to the nearest ham or bacon, to the round figure of 1400 or 1500 or 1600, or whatever it might be, would you say that using round numbers under those circumstances represented substantial inaccuracy?

MR. SELVA: Objection.

THE COURT: Sustain the objection.

MR. GOLDMAN: Your Honor, he has given an opinion as to why he thinks it is inaccurate. My question was hypothetically based on what has been testified.

THE COURT: Adhere to the rule.

Q. Now, it is the practice, is it not, in insurance company procedure, to make many of their determinations on statistical basis? That is true, is it not?

MR. SELVA: We object.

THE COURT: Sustain the objection.

Q. It is true, is it not, Mr. Sachs, that when you are dealing with a large number of transactions in this case, you are dealing with a large number of vats, which might be a fraction of a ham or bacon over or under, over a considerable period of time? Isn't it a fact that statistically and

mathematically the average over the period of time for the large number will be the round numbers used?

MR. SELVA: Object.

THE COURT: Sustain the objection.

* * *

[1077] Q. Mr. Sachs, yesterday you stated that you had examined the beef and veal product on these sheets; is that correct?

A. That is correct.

Q. Do you know that it is a fact that beef carcasses are hung in shrouds? They call them shrouds. They are cloths which are wetted. Do you know that?

A. I observed the fact that beef is hung in shrouds in the kill room.

Q. Do you know, for that reason it is difficult to get an accurate weight on beef?

MR. SELVA: If the Court please, we object to that question. I understand beef and veal are withdrawn from the case.

MR. GOLDMAN: They went into this yesterday. This is simply to show why beef and veal were withdrawn from the case. They made it appear there is some mystery about it.

MR. SELVA: We object.

[1078] THE COURT: I will let him answer this question.

THE WITNESS: Please read the question.

(Thereupon the last Q. was read by the reporter.)

MR. SELVA: That is a conclusion.

Q. Do you know what, Mr. Sachs, because of the shroud and the water that may be in the shroud, –

A. I can only say, Mr. Goldman, that is not my understanding.

Q All right. Do you know as an actual fact that beef is permitted to hang in the cooler so as to age longer than pork product? Do you know that?

MR. SELVA: Are you speaking now of the Sucher Packing Plant?

MR. GOLDMAN: Yes. Beef is permitted to hang for a longer period of time so as to permit it to age.

MR. SELVA: We object to that.

THE COURT: Well, there is no claim for beef or veal in this case.

MR. GOLDMAN: That is correct.

THE COURT: I think there is no point in going into it.

MR. GOLDMAN: The only reason I did is because they asked him yesterday to make it appear there was some mystery about it.

MR. SELVA: Now that counsel has suggested there [1079] is some mystery, we withdraw our objection. Go ahead. We have nothing to hide.

THE COURT: The Court has an objection that is —

MR. GOLDMAN: Your Honor wishes to end this at this time.

THE COURT: I have ruled. We will not go into beef or veal.

Q When you prepared this Exhibit W at Mr. Pickrel's request, which listed lard as well by weight and amount, you obtained the information from the product analysis sheets, did you not?

A That is correct.

Q And these are part of Exhibits 2 and 3?

A That is also correct.

Q That being the case, the following testimony which you gave yesterday, which I am about to read to you, by Mr. Pickrel: "You have testified that you have examined

probably not all, but quite a few of these product analysis sheets, Exhibits 2 and 4, and the transfer sheets and the inventories, and I hand you Plaintiff's Exhibit 6 for your inspection, which was introduced through Mr. Hadeler, and I likewise hand you Plaintiff's Exhibits 21 and 22, copies of them, heretofore introduced by Mr. Goldman as a witness — trying to get a witness fee out of this case — where, on any of these papers, Plaintiff's Exhibits 2 and 4, all of [1080] those, all the transfer sheets that you have looked at, all the inventory sheets that you have examined, Plaintiff's Exhibit 6, the account on which this suit is based, Plaintiff's Exhibits 21 and 22 introduced here, — where, on any of them, do you find a single figure concerning lard sales? Answer: No time. Question: On none of them; is that right? Answer: That is correct." That statement by you yesterday was untrue, was it not.

MR. SELVA: Just a minute. That is a beautiful recitation. We object. We ask the jury to disregard it. It is beautiful arguments and we would like an opportunity to reply. We object to the question.

THE COURT: I will sustain the objection to the question.

MR. GOLDMAN: To the form of the question?

THE COURT: You are asking the witness whether that is untrue.

Q. Your statement yesterday was not correct?

MR. SELVA: Object.

MR. GOLDMAN: Any objection to that, your Honor?

MR. SELVA: We objected before. Didn't you hear us? We object.

THE COURT: I will sustain the objection. I think he may show in any respect if it is not correct.

MR. GOLDMAN: I just asked him whether he got [1081] the figures on the exhibit from the product analysis

sheets. He said yes, the lard sales figures. And then yesterday he said that they are nowhere on there.

THE COURT: Then you have the question answered and it is a question for the jury to determine whether or not it is true or untrue, or correct or incorrect.

Q. May I ask this question, Mr. Sachs, I hope I don't go beyond what I should. Which statement is correct, the one you made yesterday or the one today?

MR. SELVA: We object, if the Court please.

THE COURT: Sustain the objection. That is a question for the jury.

* * *

[1082] Q. Mr. Sachs, were the following questions and answers asked you yesterday: —

THE COURT: Now, just a minute. I don't believe that is proper.

MR. GOLDMAN: I have already laid the foundation in yesterday's cross-examination, and there was a quarrel as to what the record showed. Now, I have had it written up.

THE COURT: You are proceeding on an entirely erroneous basis. It is proper to cross-examine a witness on some prior statement that he has made, for the purposes of testing his credibility. The statement you have there is the statement this witness made in court, and the Court and the jury has heard it, and to use it as you would use it as a deposition or some other prior statement, is improper.

* * *

[1085] Q. So, with respect — except with respect to the shrink, put that in there, too, except with respect to any shrink, any errors in accounting or weighing, or approximating, or anything of that kind that might be made in one intermediate inventory or another, another intermediate inventory washes itself out?

MR. SELVA: We object.

MR. GOLDMAN: Isn't that correct?

THE COURT: I will sustain the objection.

MR. GOLDMAN: What is the ground for that, your [1086] Honor?

THE COURT: Well, I consistently throughout the plaintiff's testimony, said this matter is not a matter for expert testimony. It is a matter which can be demonstrated by arithmetic and it is not a proper question to ask the witness.

MR. GOLDMAN: I only asked to test his conclusions that he has reached. It is for a different purpose at this time.

THE COURT: I don't think it tests any conclusions. Proceed.

* * *

[1087] Q. Now, Mr. Sachs, my question to you was whether it is not a fact that you would come out with the same figures that Mr. Hadeler had in his computations, and which appear on Plaintiff's Exhibits 6, 21 and 22, if you [1088] had simply used the opening inventory of the first week periods and the closing inventories of the last week periods and ignore all the intervening inventories, and in addition, using the opening and closing inventories, use simply charge-ins and charge-outs based on the product analysis sheets?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: I don't understand your Honor's ruling.

THE COURT: Well, you are mixing up a possible hypothetical situation with a situation that appeared out of that. As I have said before, that question is one that is capable of mathematical demonstration to the jury. It

anyone else, and depends on accurate inventories at beginning, accurate inventories at the end, and accuracy of incoming and outgoing items.

MR. GOLDMAN: I must phrase the question improperly, but I want to find out based on these figures, whether they are right or wrong, whether you would come out with the same answer. I am not trying to show here that the figures are right or wrong, but whether you would come out with the same answer that Mr. Hadeler got by using the product analysis sheets at the beginning inventory period and ending and ignoring all intervening inventories, just [1089] taking the charge-ins and charge-outs, whether you get the same results.

THE COURT: That, too, is a question capable of mathematical demonstration.

MR. GOLDMAN: In order to attack the statements he made, a great deal of time was spent on intervening inventories, and I want to preface this to get this question in before I reach that one in preparation for subsequent questions.

MR. SELVA: We don't want to argue our motion. There may have been two dozen ways of doing one thing. The plaintiff has chosen this way to do it. Whether it could have been done another way, depending on accurate or inaccurate figures, seems to be beside the point, except to distract the situation, and we object.

THE COURT: I will adhere to the ruling made.

Q. It is a fact, is it not, Mr. Sachs, that if you were to take the opening inventory period and the charge-ins and charge-outs, and the closing inventory period, as shown on the product analysis sheets, you could take these intervening inventories and throw them in the wastebasket, it wouldn't make any difference?

MR. SELVA: To which we object.

THE COURT: Sustain the objection.

[1095] Q. All right. Now, Mr. Sachs, from your experience as an accountant, in view of the large quantity of products flowing through the plant as compared with the amounts in the opening and closing inventories, even assuming that there might have been inaccuracies due to taking round numbers, isn't it a fact that any possible [1096] error on that account in the opening and closing inventory would become insignificant in arriving at the total shrink for a period of 17 weeks or 45 weeks, as the case may be?

MR. SELVA: We object, if the Court please.

THE COURT: I will sustain the objection.

Q. Now, yesterday, Mr. Sachs, you agreed that Sucher Packing Company did allow, as against any claim in this case, a total shrink from hot weight to sale of fresh pork for the first period of somewhere between 300 and 350 pounds and for the second period of somewhere between 500 and 600—I mean 350,000 pounds and for the second period between 500,000 and 600,000 pounds. I think you also agreed that the Sucher Packing Company allowed as a shrink against the claim as so-called normal shrink, the totals shown on Exhibits 21 and 22, of over 33,000 for smoked pork for the first period, over 100,000 pounds for sausage in the first period, over 34,000 pounds for smoked pork in the second period and 97,000 for sausage in the second period. Now, if—

MR. SELVA: Is that a question?

MR. GOLDMAN: That is the preparatory part of the question.

Q. (continued) Now, if the amounts of shrinkage allowed as normal against this claim are adequate and if

the round numbers to which you object in the transfer sheets, [1097] in fact, do substantially correctly state the figures, isn't it a fact that the only explanation that you can think of to account for the excess shrink would be a disappearance as a result of some dishonesty?

MR SELVA We object

THE COURT I will sustain the objection

[1099] Q You stated yesterday, did you not, that you did not know the amount of profit in the sales price figures [1101] that were stated on Plaintiff's Exhibits 6, 21 and 22, is that right?

A That is correct

Q As a matter of fact you don't know whether there is any profit in there at all, do you?

MR SELVA We object

THE COURT Sustain the objection

Q You made no effort to determine whether there was any profit in there, did you?

MR SELVA We object

THE COURT Sustain the objection

[1103] Q Now did you make any efforts to determine the market value of the merchandise involved?

MR SELVA We object to that at the Court please

THE COURT I will sustain the objection

Q Mr Sachs based on all that has gone here this morning with respect to figures, do you still say, bearing in mind all that has been testified to, do you still say that the figures on this blackboard have any reasonable connection with the validity or invalidity of the claim in this case?

MR SELVA We object

THE COURT Sustain the objection

[1113] MR. GOLDMAN: Your Honor, the other morning I asked that we be permitted to inspect what was supposed to be a transcript of an interview between Mr. Greene and Mr. McConkey and between Mr. Selva and Mr. Hadeler, copies of which we have never been furnished and I was not present at those interviews and opposing counsel haven't seen fit to give me copies of them, and I have asked for the same, and I believe we should be entitled to see those.

(Arguments of counsel omitted.)

THE COURT: I will overrule the motion. You have evidence to offer on rebuttal?

* * *

Testimony of Arthur Beerman.

DIRECT EXAMINATION

[1114] Q. Mr. Beerman, what was the market value of the merchandise in the various categories which are subject to claim in this case at the time the merchandise was supposedly, or it is claimed, that the merchandise was stolen?

* * *

[1116] Q. What was the reasonable market value, Mr. Beerman?

A. The market value of the product is established to the Sucher Packing Company would include a profit of from 1 to 2 percent on the whole volume. It is not charged in poundage.

MR. SELVA: Now, if the Court please, we move that answer be stricken. It is not responsive.

THE COURT: Objection sustained. The question is market value of the different products involved here. You will have to take up the different products.

THE WITNESS: I don't understand the question then. Are you asking me what the market value was on all of our products?

Q. No. The products involved in the claim, at the periods—

MR. SELVA: We object to that.

MR. GOLDMAN: I will show Mr. Beerman what we have in mind.

Q. Hand you, Mr. Beerman, three exhibits which are all identical, with respect to the question of the [1117] average selling price of the product, and I will ask you to state, during the period of—the first period of 17-weeks ended October 22, 1949, what was the market value for fresh pork and ham?

* * *

THE COURT: I will sustain the objection for the [1118] reason the witness has no independent recollection of it at all, and to hand him papers and ask him to read off what is on the papers, I don't think is evidence of the fact you are attempting to prove.

THE WITNESS: I am acquainted with these papers.

Q. Let me ask you this, Mr. Beerman. What relation did the selling price, in the periods in question, bear to the market price?

MR. PICKRELL: To which we object again, unless there is some basis.

THE COURT: Sustain the objection.

Q. Mr. Beerman, you were active at the Sucher Packing Company during this—you testified during these periods you spent your full time there and part of the time you weren't there but kept close tab on it. Were you familiar with the market prices during those periods?

A. I certainly am, and I still am.

MR. SELVA: Just a moment.

THE COURT: Overruled.

Q. With respect to the selling prices in effect at that time, Mr. Beerman, what relation did the market price bear thereto?

MR. PICKREL: I think we will object for the reasons heretofore stated. Plus the fact they are part of the chief. And if they are trying to show some imaginary [1119] difference between selling price and market value, it is altogether improper and we object.

THE COURT: I will sustain the objection.

MR. GOLDMAN: (Out of hearing of the jury.) If the witness were permitted to answer, he would say that the market price was substantially the same as the selling price for the products in question during the periods in question.

Q. What was the cost of producing the products involved in the claim during the periods in the claim in relation to their selling price?

MR. PICKREL: To which we object for the same reason.

THE COURT: I sustain the objection.

MR. GOLDMAN: The average selling price is stated, your Honor. On the exhibits.

THE COURT: That is not evidence of the selling price.

MR. GOLDMAN: And it has been stated that these figures were taken from the records of the company. They are shown and the selling prices are also shown on the product analysis sheets. Actually, the cost of production are shown on the—could be computed from these three boxes that are in evidence, boxes of papers in evidence. All the figures are in there which make up the production cost.

[1120] THE COURT: I will sustain the objection.

MR. GOLDMAN: Out of the hearing of the jury.

it permitted to answer, the witness would say that the cost of production was between 1 and 2 percent less than the sale price during the period in question for the products in question.

[1121] Q. Are you able to say without refreshing your recollection, Mr. Beerman, from some document,—can you tell from your recollection alone today what the prices were, market prices were, back in 1949 and 1950 of the products involved in the claim?

MR. PICKRELL: To which we object, unless he names [1122] the product and the time.

THE COURT: I will overrule the objection.

MR. GOLDMAN: Answer the question.

A. I could only state—

THE COURT: Well now, the question calls for ayes or no.

A. I can answer it yes, but with an explanation, your Honor, if I may.

MR. GOLDMAN: I guess your Honor won't object if there is a qualified yes.

THE COURT: If he explains his answer.

Q. Don't give your prices in the answer.

A. I merely want to explain what I think your Honor is interested in, and the jury, and I came here to tell what I know.

[1123] THE WITNESS: I want to explain it, your Honor, if I may. I don't know anything about the legal phases. I think we are interested as laymen to get this thing threshed out.

MR. PICKRELL: You come down and join the lawyers and make your speech.

THE COURT: You may explain your answer, but you can't make a general statement.

A. (continued) I know that the prices, the average prices, as used, were the market prices and I know they included a profit of not over 2 percent when it was figured for the market. There are very few meat packers that ever make more than—

MR. PICKREL: Now please. I move to strike out that entire statement as being immaterial to this case.

MR. GOLDMAN: I think his explanation has been why he said he could give an answer.

MR. PICKREL: Now, if it please the Court—

THE COURT: I will sustain the motion to strike [1134] the answer as not being responsive to the question.

* * *

REQUEST FOR SPECIAL INSTRUCTIONS AND RULINGS THEREON

[1127] THE COURT: Do you have your special instructions?

MR. GOLDMAN: Yes, I do, your Honor.

The following are the Requests for Special Instructions by counsel for plaintiff:

"INSTRUCTION NO. 1 – Under the terms of the policy of insurance issued by the plaintiff to the defendant defendant's liability is limited to $20,000.00 of any loss to plaintiff through larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts by each identifiable employee acting alone or in collusion with others. In this case it is claimed by the plaintiff that a portion of its claimed loss was due to a ring of dishonest employees, consisting of Jackson, Harris, Maiden and Hurt, who plaintiff claims was operating for at least almost two years prior to September [1127a] 11, 1950, and that Willie Early, a fifth em-

ployee, was a member of the ring for a short period prior to September 11, 1950.

If you find from the evidence that Harris, Jackson, Maiden and Hurt, did, during the period claimed, act in collusion with each other, and while so acting did cause plaintiff to sustain a loss through their dishonesty while acting in collusion with each other, plaintiff is entitled to recover the amount of such loss not in excess of $80,000.00. If you further find that the employee Willie Early, was a member of such group and that while he was a member of such group, acting in collusion with the other members of the group, such group of employees caused an additional loss to the plaintiff through their dishonesty, then to the extent of such loss, plaintiff is also entitled to recover the amount of such additional loss but not to exceed another $20,000.00.

If identifiable employees of plaintiff were acting in collusion with each other as part of a ring of thieves stealing property of plaintiff during the policy period, it is not necessary that plaintiff show the amount of loss attributable to any particular employee in the ring alone, but may recover for the total amount of the loss caused by such ring through dishonesty, not in excess of the number of identifiable employees in the ring, times $20,000.00. Since plaintiff does not claim more than five identifiable [1427-b] employees caused loss to plaintiff through their dishonesty, under any circumstances your verdict cannot exceed $100,000.00, even if you should find that plaintiff suffered loss through the dishonesty of such identifiable employees and that such loss was in excess of $100,000.00.

INSTRUCTION NO. 2 - In this case the defendant had the witness Harris identify a certain statement signed and given by the witness to detective Merica. If the statement contradicted testimony on the witness stand by Harris,

the defendant had the right to introduce the same in evidence. This the defendant did not do. You as jurors have the right, but are not obligated, to infer from defendant's failure to offer such statement in evidence, that such statement did not contradict Harris' testimony or that it was to defendant's interest not to introduce such statement in evidence.

INSTRUCTION NO. 3 — There has been testimony that detective Merica obtained written statements from certain employees of plaintiff accused of theft from plaintiff. Under the law, plaintiff did not have the right to introduce such statements in evidence.

INSTRUCTION NO. 4 — The Court charges you that your verdict in this case must be for the plaintiff, as the defendant has admitted that plaintiff did suffer a loss through employee dishonesty during the policy period. There is a dispute between the parties as to the amount of plaintiff's [127-c] loss. Subject to the limitations stated to you elsewhere in the Court's charge, your verdict shall be in such amount as under the Court's instructions, you determine that plaintiff sustained loss through larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fradulent act or acts of any employees of plaintiff acting alone, or in collusion with others.

INSTRUCTION NO. 5 — Defendant in its Answer in this case has alleged that plaintiff failed to give proper notice and proof of loss under the policy or to cooperate as required by the policy. The Court charges you that there has been no proof to support such allegations, and that such allegations are of no avail to defendant.

INSTRUCTION NO. 6 — The Court has admitted in evidence the indictment and plea of guilty to the crime of grand larceny in a state court prosecution of one of the

Request for Special Instruction and Rulings

witnesses who appeared in this case, James Jackson. Under the laws of Ohio, the crime of grand larceny involves a theft of property valued in excess of $35.00, the value of $35.00 being the dividing line between the crime of petty larceny and grand larceny.

INSTRUCTION NO. 7 - If you find that the plaintiff has suffered a loss or losses at any time or times during the policy period in this case; that is, between [1127-dj] November 1, 1947 and October 31, 1950, through the larceny, theft, embezzlement, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of any employees of the plaintiff, acting alone or in collusion with others, it shall then be your duty to determine the amount of such loss. In establishing the amount of such loss, the plaintiff is not required to prove the same with preciseness or exactitude. There is no requirement in the insurance policy issued by the defendant to the plaintiff that if property be stolen from the plaintiff by any of its employees, that such property be identified as being taken on certain specific dates or as particular number of pieces of particular kinds of property, or otherwise specifically identified. It is sufficient under the policy for plaintiff to establish that property belonging to it was lost to it through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of any of its employees acting alone or in collusion with others and to furnish a basis for determining the value and amount of such property from which you as jurors can make reasonable inferences so as to determine the amount of plaintiff's loss, even though the amount so determined by you is not exact but only approximate.

INSTRUCTION NO. 8 - In this case plaintiff is [1127-e] not claiming an inventory shortage. Plaintiff is

claiming that it sustained a loss through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts of a number of its employees. Under such circumstances, the portions of the policy in this case with respect to the proof required of inventory shortages are not applicable. Plaintiff is not required to prove conclusively that such claimed loss was through dishonesty of anyone or more of its employees, but it is sufficient that plaintiff's proof be by a mere preponderance of the evidence.

INSTRUCTION NO. 9 - It is the policy of the law that if the plaintiff has sustained damage, recovery shall not be denied because the amount of such damage is difficult to ascertain. If you find that plaintiff did suffer some loss covered by the policy in suit, it is your duty to determine the amount of plaintiff's loss, even if it is difficult to do so with certainty. In such case you should fix an amount even if the same be not exact, but only approximate, as you reasonably infer from the evidence available to you under the Court's instructions."

THE COURT: For convenience, I will number these instructions, beginning with 1 in the order they were handed to me. No. 1 is a long, two-page instruction and that I will give in substance in my own language. I will not read [1127-1] any of these verbatim in my charge. What I give, I will give in substance. No. 1 I will give in substance.

No. 2. I don't think is the correct or applicable statement and I will not give No. 2, that is the one with reference to the introduction of the statement given to Mr. Merica. I will not give it in substance. I don't think it is a correct statement. The plaintiff, or the defense counsel cross-examined the witness about the statement and read some questions to him which he admitted making. That

[128] I think, is sufficient for impeachment. Whether the jury determines it is impeachment or not, is a matter for them, which statement they will believe. But I don't believe that they were required to offer it in evidence as long as it had served its purpose to get his admission of questions which were asked.

MR. GOLDMAN: May I make a suggestion as to part of it? He didn't admit a certain question that was asked. He asked whether he made a statement and he said he didn't remember.

THE COURT: It only serves for contradictory statements where they were made and admitted. It has no other purpose.

No. 5, which refers to the fact that the plaintiff did not have a right to introduce certain statements, I will not give, for the reason that I don't think it is an issue. It is a negative sort of statement. The statements were not introduced. The questions were not raised. It was not proper for the plaintiff to introduce them. I don't see any point in telling the jury that. That is a negative approach.

No. 4, I will give in substance, except that I don't think that I will say that the verdict must be for the plaintiff. There is no admission in the pleadings in this case nor in open court there is evidence of admissions having been made which the defendant — or which the jury might [129] accept or not as it shows.

MR. GOLDMAN: I respectfully call your attention to the latest answer filed, in the third paragraph, admits that on September 11, 1950, plaintiff discovered one of its employees committing a dishonest act which caused a depreciation in and loss of meat products processed by plaintiff.

THE COURT: I haven't been furnished with a copy of that. May I see that?

MR. GOLDMAN: It was handed to me yesterday, or day before.

THE COURT: Sort of a left-handed admission. What is the explanation of counsel for defendant on that?

MR. SELVA: They found some hams on the 11th day of September, and there may be depreciation of the value of those products. In what amount we don't know. There is no evidence of that.

THE COURT: In some amount.

MR. SELVA: Oh, in some amount, sure.

THE COURT: All right. I will tell the jury that they must find some amount.

No. 5, counsel for defendant have anything to say on No. 5?

(Argument of counsel omitted.)

THE COURT: I will not give No. 5 for the reason [1130] it is a comment on the evidence rather than any statement of law. The burden of proof is on the plaintiff to show proper notice and proof of loss, and it is not necessary for the Court to charge the jury on the evidence.

No. 6, I will not give because I see no materiality with reference to that one.

No. 7, I will give in my own language, the substance of it.

No. 8, I will not give for the reason I expect to tell the jury before arguments, that I am taking away from the consideration of the jury the matter of attempting to determine any damages by virtue of inventory shortage. So there is no point in legal instructions confusing the jury about inventory shortage.

Does the defendant have any special charges? (After Mr. Selva hands special charges to the Court:) I will letter these consecutively beginning with A. The first one I will letter A.

The following are the Special Charges Requested by counsel for defendant.

SPECIAL CHARGE REQUESTED NO. A — Members of the Jury: If you must resort to guess and speculation to determine the issues in the case, then your verdict must be for defendant.

SPECIAL CHARGE REQUESTED NO. B — Members of the [1130-a] Jury: It was the duty of the plaintiff to file proof of loss pursuant to the terms of the policy issued by defendant and, if you find that proof of loss was not filed in accordance with the terms of the policy and defendant has not waived such requirement, then your verdict must be for defendant.

SPECIAL CHARGE REQUESTED NO. C — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of James Jackson; second, what such dishonest act or acts consisted of; third, the date or dates of each such act; fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

SPECIAL CHARGE REQUESTED NO. D — Members of the Jury: I charge you that the Jury is not permitted to guess and speculate.

Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Willie Early; second, what such dishonest act or acts consisted of; third, the date or dates of each such act; fourth, the kind and weight of each meat product lost by

plaintiff [1130-b] because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. E — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Helen Hurt, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. F — Members of the Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of William Harris, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by plaintiff because of each such act or acts and the reasonable value thereof to plaintiff.

"SPECIAL CHARGE REQUESTED NO. G — Members of the [1130-c] Jury: I charge you that the jury is not permitted to guess and speculate.

"Plaintiff must prove by a preponderance of the evidence, first, that it did sustain a loss of hams, shoulders or bacon by reason of a dishonest act or acts on the part of Robert Maiden, second, what such dishonest act or acts consisted of, third, the date or dates of each such act, fourth, the kind and weight of each meat product lost by

plaintiff because of each such act or acts and the reasonable value thereof to plaintiff."

THE COURT: As I indicated before, if it comes to the matter of damages, there will have to be some amount.

The second I will letter B, with reference to the proof of loss. I would like to hear defendants on that one. What do you have to say with reference to that?

(Argument of counsel omitted.)

THE COURT: I will give that substantially as it is. It is a question for the jury to determine, whether or [1131] not there was proof of loss.

The next one I will letter C. That one begins a series of five, all of which are the same. This one refers to Jackson; the next one I will letter D. That concerns Willie Early; the next one E. That concerns Helen Hurt. The next one F, that concerns William Harris. The next one G, that concerns Robert Maiden.

I will not give those verbatim because I believe they require more specific findings than are required of the plaintiff. I may say that I think the only testimony before the Court and jury is based on hams, shoulders and bacon, because that is what the witness, William Harris, says was what they took.

MR. GOLDMAN: I don't have copies here. I copied this in long hand for opposing counsel. I would like to offer another instruction. As your Honor was making the statement, I wrote another one out in longhand which I will have typed up.

THE COURT: I am not going to continue to take these. You had an opportunity to present them.

MR. GOLDMAN: Based on one of the instructions your Honor said you would give for the defendants.

THE COURT: The one you just handed me I will number No. 9 and I will not give it verbatim. I will try

to cover the subject of damages substantially as I think it [1132] should be.

MR. SELVA: Is the Court receiving this now?

THE COURT: No. 9 I have received, and say I will not give it verbatim. But I will try to give a proper statement on the matter of damages.

MR. GOLDMAN: Your Honor, may I make an application to the Court? Your Honor has stated that he would give in substance No. B as to the proof of loss. I would like your Honor, if you will not accept the informal one I have here, if your Honor would qualify that by stating in accordance with the Court of Appeals of this Circuit and the other Courts of Appeal that where the defendant has denied the claim on merits, it objecting to any notice of proof of loss, that any objections thereto are being waived. That is the exact holding of the court in many cases in the Courts of Appeal.

THE COURT: I will check that. If I find it necessary, I will make it a part of my instructions. I take it we have concluded this matter?

[illegible] I would like to qualify what I said with reference to instructions No. 1 in the light of what I said in connection with the instruction letter B. I would have requested No. 1 to the extent that if the jury found there was no proof of notice, the verdict would have to be for the defendant.

[illegible]

INSTRUCTIONS OF COURT BEFORE ARGUMENT

[1133] THE COURT: Ladies and gentlemen of the jury, I believe I told you at the beginning of this trial that it was the duty of the Judge to determine questions of fact, and that it was the duty of the Judge to determine questions of law. You, the jury, have been considering questions

of law, and the Court arrived at these legal conclusions or at these conclusions.

First, that in your consideration of this case and endeavoring to arrive at a conclusion, you are not to consider the evidence of an inventory shortage.

[1137] I realize we have been here a number of days hearing evidence on the question of inventory shortage and it is necessary that the Court hear all the evidence. Then it becomes necessary for the Court to determine as a matter of law whether that presents a factual question which may be considered by the jury.

So, the Court has determined, as I say, that in arriving at your verdict, you will not consider this evidence of inventory shortage. In other words, it cannot be used by you as any measure of determining any loss to the plaintiff.

The second thing that I withdraw from your consideration is a claim in the plaintiff's second amended complaint of an item of damages referred to as "loss sustained by dishonesty of unidentifiable employees." In the policy of insurance, which is the subject of this action, there is a provision that, under certain circumstances plaintiff may have a right to recover a loss sustained by theft or otherwise by employees who are not specifically identified. That claim is in the complaint, and that I withdraw from your consideration.

I will give you further instructions later. And I might say to you at this time, primarily, the case will be submitted to you for your determination on the facts upon the testimony of William Harris.

The attorneys will undoubtedly make this clear in their argument as they present the argument to you. And I [1138] think also that it might be fair to state to you at this time, that when you retire to your jury room for the

consideration of the case, it will be upon what we call a special finding of facts. In other words, you will be asked to make findings upon various facts at issue in the case and not to return a general verdict.

At this time, counsel —

MR. SELVA: May it please the Court, in view of the defendant's present position, we respectfully request a realignment of the exhibits and respectfully request an order requiring plaintiff at this time to produce original statements of Helen Hurt, James Maiden, William Hart, James Jackson and Willie Early, for submission to the jury.

THE COURT: That motion will be overruled. It is correct that only those exhibits which will be pertinent to the issue now before the jury should be submitted to the jury, if you can ascertain this before the case goes to the jury.

. . . .

Excerpts from the argument of Mr. Pickrel, Counsel for Defendant.

[1169] So maybe these people made a mistake when they signed this paper, but they signed it, and here is one of the things that Sucher Packing Company is expected to do, if they want to collect, and I think you will agree it is reasonable. As soon as practicable but in any event not later than fifteen days after discovery by the Assured of any loss or any occurrence which may give rise to a claim, the Assured shall give the Company written notice thereof, at its Home Office in Philadelphia, Pa., and within four months after such discovery shall file with the Company affirmative itemized proof of loss, duly sworn to, including the instrument which is the basis

MR. GOLDMAN: I object. It is not proper argument.

THE COURT: I will overrule the objection.

MR. PICKREL: Now, I think that is certainly reasonable. You can't expect an insurance company to pay a claim unless there has been a proof of claim filed.

* * *

[1172] That is enough to defeat the claim and you can find for the defendant on either one of those counts that there is no proof of claim or there was no exhibition of those papers that Mr. Sachs required, and that is a sound verdict.

MR. GOLDMAN: Objection.

THE COURT: Overruled.

MR. PICKREL: Now, we say this to you. There was no proof of claim filed on the matter before you today. You know that better than I do.

* * *

[1176] You will also find in the papers — I am sure it will be among the papers, although they are going to put the eliminator on a lot of these exhibits — you will find the court record of the indictment of William Harris and James Jackson, and you will also find that any indictment returned against Robert Marden was dismissed, nothing ever done about it.

MR. GOLDMAN: We object. That is not in evidence, your Honor.

THE COURT: I think that is not in evidence.

MR. PICKREL: Well, it is over there some place, in that basket of papers that Robert Marden's indictment was dismissed.

MR. GOLDMAN: I object.

THE COURT: I think the Court excluded that evidence.

MR. PICKREL: I don't know how you could. The other is in.

Excerpt from closing argument of Counsel for Plaintiff

[1186] They haven't offered this statement in evidence to prove Harris wasn't telling the truth and as for them saying we should offer statements on these other employees they know we can't do that, we are not allowed.

MR. SELVA: If the Court, please, that is not a correct statement, that they are not allowed to do it. We have no reason and no objection to offering of these statements to the jury.

MR. GOLDMAN: Your Honor –

MR. SELVA: Go ahead and put them in.

MR. GOLDMAN: The case is closed.

MR. SELVA: Oh, sure.

THE COURT: May I say again that if argument be based on the evidence that is in the record and argument whichever side it comes from about evidence that is not put in the record and any blame attached to one side or the other for not putting it in the record, I think is not a matter of proper argument, or argument upon the evidence that is in the record, and the jury, as I said before, I believe will have intelligence enough to sort out the evidence that has been given from the witness stand and which the Court allowed. Now will you proceed briefly with the argument.

MR. GOLDMAN: May I say, your Honor, that the reason for the statement was in response to Mr. Selva's [1187] statement.

THE COURT: I am not interested in the reason for it.

Charge of the Court

(1191) THE COURT: Ladies and Gentlemen of the jury, I think I stated to you yesterday that the issues which you will have to find in this case are to a large extent involved in the testimony, or contained in the testimony of William Harris. I don't know of any precedent for what I am going to do now, or any legal authority for it, but it has been nearly three weeks since Mr. Harris testified. Yesterday, during the arguments of counsel, they read various portions of Mr. Harris' testimony, at different times, different parts of it. So, I think in fairness to you, in order that you may be better able to understand the case and the charge and the work that you will have to do, I am going to ask Miss Fischer, the court reporter, to read Mr. Harris' testimony in its entirety, both direct and cross-examination.

(Thereupon William Harris' testimony was read by the reporter.)

THE COURT: As I have said, your duties as jurors are to determine questions of fact, and the duties of the judge are to determine questions of law.

(1196) Now, may I explain to you what we mean by evidence, first by stating what was not evidence. The opening statements that the lawyers made here to you at the beginning of the trial, their arguments at the close of the trial, their statements that they have made in court during the progress of the trial, and any of the statements that I have made during the progress of the trial, are not evidence. That is the duty of the lawyers in the trial of a case to make objections to the admission of testimony, it is to consider, according to the rules of evidence, that testimony is not proper, and you will draw no inferences from any questions that were asked, if objections were

made and the objections sustained. You will not draw any inference from the question itself or speculate on what the answer might have been.

Then, from time to time, during the progress of the trial, the Judge orders certain statements stricken out or stricken from the record. They may be statement of counsel, they may be statements of witnesses. So, when the Court orders a statement to be stricken from the record that means you are to disregard that and completely put it out of your mind. You are not to consider them in any way.

I have stated to you heretofore that you are to disregard evidence pertaining to inventory shortage. So I will say again now that in arriving at your verdict, you will not consider the matter of the evidence concerning the [1190] matter and its defense to the claim made by the plaintiff.

These papers, the Second Amended Complaint, and the Answer are known as pleadings and you will have them with you in your jury room. They are not evidence. You may use them to refresh your recollection as to the issues in the case and where there are admissions contained in the Answer, you may consider those admissions as being true without any further testimony on them.

The plaintiff's complaint is based upon a policy of insurance issued by the defendant to the plaintiff. This policy has been offered in evidence as an exhibit and will go with you in your jury room. It is not the actual policy but it is agreed by counsel it is an accurate and exact copy of the policy between the parties.

One of the things that this policy insures is: Employee Dishonesty Coverage. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent acts or acts committed anywhere by any of the Employees act

ng alone or in collusion with others, including loss of Money and securities and other property through any such acts or acts of any of the Employees."

Now, I have stated to you and had read to you Mr. Harris' testimony, and stated that in his testimony was contained substantially the matters pertaining to theft that [1197] will be before you. You must consider all of the evidence in the case that I have allowed to go to you and that I have not withdrawn from your consideration.

One of the important questions that arises in this case refers to the matter of time. First, before I get to that, may I make this comment with reference to William Harris as a witness. As has been brought out in the evidence, and it is undisputed, William Harris was convicted of grand larceny. In the early history of our law, a person who had been convicted of a felony, and grand larceny is a felony, was disqualified to testify as a witness, for the reason it was considered that the person was guilty of a felony, his word was not capable of belief. But now by statute, particularly in Ohio, a person is not disqualified as a witness. He may testify and the question of credibility, how far you may want to believe him or whether or not his conviction has any effect upon his credibility is purely a question for you, yourself, to consider.

As I started to say a moment ago, one of the essentially important questions in this case is the matter of the time of employment of William Harris. When was he employed? How long did he work for the plaintiff?

There is evidence that Helen Hurt, Robert Marden and James Jackson were employed by the plaintiff before 1948. Plaintiff has employment records to this effect. Plaintiff [1198] has an employment card to the effect that Willie Early was employed July [illegible]. William Harris, according to the record evidence, was employed regularly July

26, 1950, and there is a card showing that he worked three days, beginning April 26, 1950. Mr. Harris, you will recall, said he worked off and on before his regular employment. Mr. McConkey said he was there. That is, Harris was there when he came to the plaintiff's place in September, 1949.

The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection, you have a right to consider the testimony that the plaintiff destroyed employment records in 1953, while this suit was pending.

If the plaintiff fails to prove by a preponderance of the evidence the employment of William Harris, other than what is shown by records, then this case must fail to that extent. You cannot consider any thefts of anyone during the time that William Harris was not working for the plaintiff. The only testimony you have of any thefts is from William Harris. Obviously, if he wasn't working, he couldn't steal anything and wouldn't know what anyone else did.

You have a right to consider the plaintiff's place was guarded by detectives during the period in question, that they, the detectives, never discovered any thefts.

While James Jackson and William Harris were [1199] prosecuted, the evidence is silent about Helen Hurt, Willie Early and Robert Maiden, except what William Harris says about them. If you observe the testimony, you will note that the only time William Harris mentioned Maiden, Hurt or Early in his direct examination, was when Mr. Goldman used their names in his questions. Mr. Harris said they were involved with him. Involved, with reference to a statement of that kind, is a conclusion, that is involved with him. It is an unsatisfactory sort of evidence. It doesn't have much meaning.

On cross-examination, William Harris was confronted with a statement he had made to Mr. Merica, the detective at the time of his arrest. It is proper for the purpose of testing his veracity. He admitted that in that statement he had answered a statement to Mr. Merica that Jimmy Jackson got him to stealing hams about three weeks before his arrest. He explained this by saying that he meant he had been hauling three weeks.

You are the judge of the credibility of the witness, and it is up to you to determine how much reliance to place on his testimony.

Yesterday, in the arguments of counsel, Mr. Pickrel argued about proof of loss. Now, the matter of the proof of loss based upon certain facts becomes a question of law for the Court to consider. You will only make a determination [1200] as to what was taken, what the facts were in connection with making a proof of loss.

Now I have prepared for you a document entitled "Special Verdict". It may seem long and it may seem complicated, but I think if you will take it step by step and attempt to pass upon the questions that are submitted, you will not find it too difficult. This is the means by which you make findings of fact and report the facts to the Court.

You are not limited to what is submitted here. If you find that other facts are important that you wish to make a finding on, considering the issues in the case, you may make additional findings that are not indicated in this document.

Now, this document is part narrative and part made up of interrogatories, of questions which you will be called upon to answer.

The first part of it here is in narrative form and I think perhaps you will find things there the evidence is not dis-

puted on. However, if you find there is any fact stated here that you cannot find by a preponderance of the evidence you should strike it out.

I will read this first part. "That the plaintiff, the Sucher Packing Company, and the defendant, Manufacturers Casualty Insurance Company, are corporations and were such at [1201] all times alleged in the second amended complaint.

"2. That on December 30, 1947, the defendant issued an insurance policy to plaintiff, for which the plaintiff paid a premium, a true copy of said policy being plaintiff's exhibit No. 9 admitted into evidence;

"3. That the plaintiff notified John I. Macbeth, agent of the defendant, by telephone on or about September 12, 1950, that it had sustained a loss;

"4. That the plaintiff prepared a paper entitled proof of loss which is plaintiff's exhibit No. 11-A, admitted into evidence, and that said proof of loss was received in the mail by the defendant company at its home office on or about January 5, 1951;

"5. That on September 11, 1950, William Harris and James Jackson were apprehended at the plaintiff's plant in an alleged act of larceny, and as a result thereof, each was subsequently convicted of grand larceny;

"6. That the defendant admitted by plaintiff's exhibits Nos. 17 and 20, admitted in evidence, that plaintiff sustained a loss in the amount of $291.14;

"8. That Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff on or before November 25, 1948."

[1202] And then there follows five subdivisions each subdivision headed by the name of one of these five employees. First is William Harris and there is a statement here. "That William Harris was regularly employed by the plaintiff on or about July 26, 1950." You will recall

there is an employment card on that. If you don't believe that is sustained by the burden of proof, by the preponderance of the evidence, you need not accept it.

Then follows a question. Was William Harris employed by the plaintiff at any time prior to the above date? If so, give date or dates of previous employment.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris? The testimony of William Harris shows that only hams, shoulders and bacon were taken, so, if you find that to be true, you will accept that fact that only hams, shoulders and bacons were involved.

Do you find plaintiff sustained a loss of hams, shoulders or bacon because of any dishonest act or acts on the part of William Harris?

If you find William Harris committed any dishonest act or acts in violation of the terms of the policy of insurance which is the subject of this action, you will make a finding of the facts upon the following things in relation thereto.

May I explain, you will answer the previous question. [203] If you answer that in the affirmative, then you would be required to go on and answer the following matters with reference to that. If you should answer that question "No" then there would be no application of the succeeding questions. But here are the further findings that you would be asked to make, if you answer the first question "Yes."

1. The date or the time during which such dishonest act or acts occurred.

2. The nature of the dishonest act or acts.

3. The number of hams, shoulders or bacon taken, if you find any were taken.

4. The approximate weight in pounds of each item.

"5. Were any such dishonest act or acts committed by William Harris alone, or in collusion with any of the following-named employees: James Jackson; Willie Early; Helen Hurt or Robert Maiden?

"6. If they were committed in collusion with any of the above-named persons, give the names of such person or persons."

Now, there follows a heading here "Strike out either 7 or 8 or both of them if not applicable" and I will read 7 or 8 in a moment.

I will explain to you a little more fully later the burden of proof is upon the plaintiff to prove the [1204] elements of its case by a preponderance of the evidence. And if the defendant fails to prove any of the items which it is required to prove by a preponderance of the evidence, then your finding must be for the defendant.

MR. PICKREL: Pardon me. You said "If the defendant fails to prove".

THE COURT: Thank you. I am sorry. If the plaintiff fails to prove any item of its case by the preponderance of the evidence which it is required to prove, then the plaintiff would fail on that particular issue and you would have to find for the defendant. So, I have stated 7 and 8 here:

"7. We find that there is insufficient evidence to make a finding by preponderance of the evidence that William Harris committed any dishonest act or acts.

"8. We find that there is insufficient evidence to make a finding by preponderance of the evidence as to the number or approximate number of pounds of hams, shoulders or bacons taken by William Harris."

Now, I say, if you follow this carefully you will ascertain whether 7 or 8 are applicable and whether they should be left in or whether they should be stricken out.

You will understand that you, the jurors, are making the

findings here. It is necessary that all twelve of your number agree upon every fact found, on every question [1205] and answer, on every fact found.

Now, I have gone through the interrogatories concerning William Harris. Then follows James Jackson, the same queries, the same questions; Robert Maiden, same questions, same 7 and 8 to be accepted or rejected, in accordance with the facts as you find them.

Now we come in the same way to Willie Early. Willie Early is prefaced with the statement: "We find that Willie Early was employed by the plaintiff on or about July 3, 1950." I think it is undisputed, but if you do not find that is true by a preponderance of the evidence, you will disregard it.

Now it comes to a place where you are required to find number of pounds of items of meat taken. If you find dishonest acts and meat was taken, you are asked to state the amount. If you come to that point at any place, I will instruct you in this way with reference to that: You should not guess at an amount; you should not speculate, really pick some figure out of the air. But, on the other hand, you are not required to find it with perfect exactitude or with precise mathematical calculation. But there must be some basis for your computation which will reasonably afford you an opportunity to arrive at some figure that approximates correctness.

Now there is another interrogatory here following [1206] the five names: "Do you find that the plaintiff withheld from the defendant papers, books, vouchers or any records bearing in any way upon the claim made in this case, for which the defendant made a request? If so, what was withheld?"

Another interrogatory: "If you find that the plaintiff sustained any loss due to the dishonesty of any of the

above-named five employees, list the total amount taken by all employees, of each item in pounds." And then there are blanks to list hams, shoulders and bacon, total amount taken.

Then there follows a blank page on which you may make any other findings you deem necessary or change anything that indicates a finding in this form.

And then there follows 12 lines for signatures.

Now, as I have indicated, the burden of proof is upon the plaintiff to make out each and every essential element of its claim by a preponderance of the evidence. By a preponderance of the evidence, we mean the weight of the evidence. By the weight of the evidence we mean that evidence which outweighs or overbalances in your minds the evidence opposed to it.

If you find that the evidence favorable to the defendant's claim equals or exceeds that which is favorable to the plaintiff's claims, the defendant must prevail as the [1207] plaintiff has thus failed to sustain the burden of proof.

You should not be swayed or influenced by any feeling of sympathy or prejudice. It is your duty to carefully reflect upon all of the evidence before you and make your finding in accordance.

Let your only effort be to arrive at a just and fair verdict between the parties.

If you consider anything that the Court says in this charge as an expression of opinion on any disputed question of facts, you may disregard it, because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses. It is peculiarly in the province of the jury to judge of the credibility of the witnesses. That is to say, the extent to which they should be believed and the importance and weight to be given to their testimony. You may believe all of any witness' testimony, or you may dis-

believe all of it; or you may believe it in part and disbelieve it in part.

In considering the testimony of a witness, you should take into consideration his interest, if any, in the outcome of the case; his affiliation, if any, with either of the parties, and any bias or prejudice which he might naturally be expected to have as the result of such interest or affiliation. But such interest or affiliation is not at all conclusive against accepting his testimony. Those are [1208] simply facts which should be considered in weighing.

Likewise, you should consider the demeanor of a witness upon the stand, whether his testimony as a whole is consistent or conflicting in some of its parts. Whether or not there is anything in his manner of testifying that would indicate such prejudice or bias as might induce him to color his testimony or exaggerate facts in favor of or against either party to the suit. And every other attendant fact or circumstance upon which you might reasonably base a conclusion as to the credibility of his testimony.

You are not obliged to accept as true testimony of any witness or witnesses, if in your opinion, judging from common observation, it may be mistaken, untrue or unreliable.

Now, when you retire to your jury room, you will first select a foreman and then as I previously said, it is necessary that your verdict be unanimous. That means it must be unanimous upon each and every fact found by you, each and every answer that you make.

I don't know if I made it clear. I think you understand that your answers to questions are to be written on the document. I think there is enough room for you to write that.

Now, if you will remain in your seats just for a few moments, I will consult with counsel in chambers.

[1209] (Court and counsel retired to chambers and the following proceedings were had out of the presence and hearing of the jury):

THE COURT: I will hear counsel for plaintiff first.

MR. GOLDMAN: I would like to and do request that first, before making the request, object to the form of the special verdict. I believe the special verdict in its form places a burden on the jury of finding with exactness more than it is required by law.

I further request that the special verdict permit the jury to find values of property taken.

I also believe that the form of the special verdict de-emphasizes the right of the plaintiff to recover for dishonest acts of individual employees in collusion with others, even when not acting alone and requires a greater degree of particularity with respect to the dishonest acts to be found or required by the policy.

I also feel that the form of the questions and the manner in which the special verdict is arranged is apt to make it easier for the jury to find the facts against the interests of the plaintiff. Insofar as the form of the special verdict, I am making that very respectfully, but I wish to have it in the record, that is the way I feel about the special verdict.

And as to the Court's charge, I believe that the [1210] Courts comments on the evidence were such as to disparage the testimony of William Harris unduly.

Also take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered in describing the inventory shortage evidence.

I think also your Honor's comments in regard to the fact that the record was silent about what happened to Maiden, Hurt and Jackson will create an inference against

the interests of the plaintiff, which is not necessarily so. Whether they were convicted or not doesn't make any difference. They may be just as guilty. Many criminals loose that haven't been brought to trial.

And your Honor's reference to Harris employment, while you referred to his regular employment beginning date in July and the interrogatory referred to whether he was employed before that date, and I feel your Honor should have referred to regular — your Honor should have put the query whether he was employed on a part-time or irregular basis. The jury may be under the impression in the form the matter is put to them that his employment prior to the July date would have to be of the same character as it was subsequent to that date.

Also, in the form of the special verdict there is [1211] no place for a finding that the defendant acknowledged the claim was valid ~~in~~ part and denied the balance of the plaintiff's claim without making any objection or taking any exception to the manner, form or time of the filing of notice or proof of loss.

Further, I request that the Court add to its charges that the jury has the right but is not required to infer from the failure of the witness Jackson to answer questions propounded to him that he could not truthfully answer such questions without incriminating himself.

Also request the Court to delete from the form of the special verdict the reference to any failure on the part of the plaintiff to supply any papers or other records on the request of the defendant, for the reason that there is no evidence, even if you take Mr. Sach's statement, which is the only evidence of any possible figures, to furnish documents requested by the plaintiff, that is in August 1954 long after suit has been filed, long after the defendant filed their answer, making whatever denials it wished. So, I

think that the interrogatory, first, should not be put, because there is no evidence to justify the jury saying that it had a bearing on the matter; secondly, that if put, the time should be fixed.

Also like to request that the Court add to its instruction that the failure — that from the failure of the [1212] defendant to offer in evidence to identify the statement of William Harris, that the jury is entitled to, but not required to, infer from that failure that such statement did not in particular, other than Harris admitted was in the statement, contradict Harris' testimony or that it was to the defendant's interest not to introduce the statement in evidence.

Also request that the Court add the instruction that the jury cannot infer, — make any inference that any other statements taken by Merica from other employees were in any way unfavorable to the claims of the plaintiff by reason of the fact — from the fact that the plaintiff did not offer them in evidence on the ground that the plaintiff did not have the right to introduce them in evidence.

I also think the interrogatories should make a finding that the plaintiff did suffer some loss, if that is admitted in the answer. The special verdict should make a finding that the plaintiff did suffer some loss because that is admitted in the answer.

Further, I ask the Court to amplify its charge on the burden of proof as to the amount, the statement that if loss has been established and only the amounts thereof is uncertain, that such uncertainty alone is not ground for the jury not fixing some amount, even though approximate, if there is any reasonable basis on which the jury can do so. [1213] I know your Honor did make a charge on that subject, but I don't feel the charge went as far as it should have

to protect the interests of the plaintiff, particularly in view of the form of the special verdict.

I think I have said enough.

THE COURT: Without attempting to go into each item here for the record and answering it, I have noted my decision as I went along, with reference to the points you raised, and it is the decision of the Court that it will not delete anything from the charge or the special verdict, nor will it amplify its instructions.

Several objections you raise with reference to the special verdict are not applicable at all, for the reason, for instance it is clearly stated in here $291. loss. They could hardly return this without finding $291., unless they deliberately strike it out. And so with a number of things. I tried to frame the questions with reference to these individual employees in such a way that I did not impose a specific burden as to an absolute date, exact number of pounds taken, but I can hardly see how anyone could arrive at a final conclusion of judgment without having found upon each of the issues raised by the questions about those employees. So, I will overrule the request made by counsel for plaintiff.

Now, do counsel for the defendant have anything?

[1214] MR. SELVA: My only suggestion, if the Court please, might be the reading of that portion of the policy which required the plaintiff to make available upon request of the defendant. The Court did read the first part of the coverage. Unless the Court might feel reading it at this time might place undue emphasis on it and in that case we have no request.

THE COURT: What the jury is doing is making a finding of facts, what we want to know is whether or not they refuse anything. If they say they do, then the Court determines the matter of law.

MR. SELVA: I have nothing further to suggest to the Court.

MR. GOLDMAN: May I also request at this time that there be submitted to the jury in evidence the figures as to the sales price? I made that request not on the record before.

(Off the record).

MR. SELVA: Note our exceptions to the charge and the special verdict.

(COURT AND COUNSEL RETURNED TO THE COURT ROOM WHERE FOLLOWING PROCEEDINGS WERE HAD IN THE HEARING AND PRESENCE OF THE JURY.)

THE COURT: All right. Members of the jury, the case is now submitted to you for your deliberations. It [1215] is 11:30. I am not aiming to in any way hurry you at your arriving at your conclusion. In due and proper time, if you haven't arrived at a verdict, the Court will permit you to go to lunch.

Plaintiff's Exhibit 5-A

THE STATE OF OHIO, MONTGOMERY COUNTY

FILED: Nov. 21, 1950.

THE COURT OF COMMON PLEAS

Terms in the year Nineteen Hundred and Fifty

MONTGOMERY COUNTY, ss.

THE GRAND JURORS *of the County of Montgomery, in the name, and by authority of the State of Ohio, on their oaths do present and find that*

RECEIVED
SHERIFF'S OFFICE
Nov. 21, 11:38 AM 1950
Montgomer County,
Ohio.

William Harris and James Jackson

on or about the Eleventh *day of* September *in the year one thousand nine hundred and* Fifty *in the County of Montgomery, aforesaid*, and State of Ohio, did steal from The Sucher Packing Company, a quanity of beef, pork and hams, in an amount and value in excess of Thirty-five ($35.00) Dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

on or about the Eleventh *day of* September *in the year*

one thousand nine hundred and Fifty *in the*

County of Montgomery, aforesaid, and State of Ohio, did steal from The Sucher Packing Company, a quanity of beef, pork and hams, in an amount and value in excess of Thirty-five ($35.00) Dollars; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

MATHIAS H. HECK /s/
Prosecuting ATtorney of
Montgomery County, Ohio.

I hereby certify this to be a true and correct copy.
Witness my hand and seal this 11th day of [illegible] *1954*

A. O. PAUL, CLERK
Clerk of Common Pleas
Court of Montgomery County, Ohio
By [signature]
Deputy

COPY

No. 17293

THE STATE OF OHIO, MONTGOMERY COUNTY
COURT OF COMMON PLEAS

September Term, 19 50

The State of Ohio

vs.

William Harris and

James Jackson

INDICTMENT FOR

Grand Larceny

A TRUE BILL

Harry L. Smith
Foreman of the Grand Jury

Prosecuting Witness

Plea

Filed, 19

~~Filed;~~ Nov. 21, 1950
Clerk

MATHIAS H. HECK
Prosecuting Att'y Montgomery County

On the 21 day of Nov. 1950, I served a duly certified copy of the within indictment, by handing same to James Jackson, defendant

Fees $ 2.10

BEN H. SMITH Sheriff.
By: O. McClain Deputy

RECEIVED
SHERIFF'S OFFICE
NOV. 21 12:43 PM 1950
Montgomery County,
Ohio.

TO THE SHERIFF:

I hereby certify the within to be a true copy of the original indictment on file in this office.

G. O. Paul *Clerk*

Plaintiff's Exhibit 5-B

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
FILED: :DEC. 1, 1950

STATE OF OHIO, :

Plaintiff, : CASE NO. 17293

-vs- :

JAMES JACKSON :

Defendant. : E N T R Y

:

* * * * * * * * * * * *

On this 1 day of December, 19 50, the defendant, James Jackson came before the Court with his counsel and withdrew his plea of not-guilty and entered a plea of guilty to Grand Larceny, as he was charged in the indictment; which plea was accepted by the Court.

WHEREUPON, the Court referred the defendant to the Probation Department for investigation and report before final disposition.

CRAWFORD /s/
JUDGE

MATHIAS H. HECK,
Prosecuting Attorney

_____
and withdrew his plea of not-guilty and entered a plea of guilty to Grand Larceny, as he was charged in the indictment; which plea was accepted by the Court.

WHEREUPON, the Court referred the defendant to the Probation Department for investigation and report before final disposition.

CRAWFORD /s/
JUDGE

MATHIAS H. HECK,
Prosecuting Attorney

By: RUSSELL L. CARTER /s/
Russell L. Carter.
Assistant.

I hereby certify this to be a true and correct copy.
Witness my hand and seal this 30th day of January 1941
A. O. PAUL, CLERK
Clerk of Common Pleas
Court of Montgomery County, Ohio
By A. O. Paul
Deputy

POLICY No. 69499

Manufacturers Casualty Insurance Company

PHILADELPHIA, PA.

Comprehensive Dishonesty, Disappearance and Destruction Policy

(Revision of 3/12/45)

The Manufacturers Casualty Insurance Company (herein called Company), in consideration of the payment of an agreed premium, and subject to the Limits of Liability, General Agreements, conditions and other terms of this Policy, does hereby agree with The Sucher Packing Company

(hereinafter called the Assured)

whose principal address is 400 North Western Avenue, Dayton, Ohio

To Indemnify the Assured for all loss sustained during the policy period which shall begin with the 1st day of November 19 47 ;

In Accordance with such and so many of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of insurance in the table of Limits of Liability:

Limits of Liability

Insuring Agreement I, Option A	$ Nil
Insuring Agreement I, Option B	$ 20,000.00
Insuring Agreement II	$ 10,000.00
Insuring Agreement III	$ 10,000.00
Insuring Agreement IV	$ Nil
Name of Depository:	
Address:	
Insuring Agreement V	$ 25,000.00

INSURING AGREEMENTS

Employee Dishonesty Coverage

I. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and that part of any inventory shortage which the Assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of the Employees; provided that if there is designated in the Limits of Liability an amount against

Option A—(Primary Commercial Blanket Bond Coverage)

then such amount shall be the Company's aggregate liability under this Insuring Agreement I as to all Employees

I. Through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and that part of any inventory shortage which the Assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of the Employees; provided that if there is designated in the Limits of Liability an amount against

Option A—(Primary Commercial Blanket Bond Coverage)

then such amount shall be the Company's aggregate liability under this Insuring Agreement I as to all Employees in accordance with the restoration provisions of Paragraph 9;

Or, if there is designated in the Limits of Liability an amount against

Option B—(Blanket Position Bond Coverage)

then such amount shall be the amount of the Company's liability under this Insuring Agreement I as to each Employee.

Loss Caused by Unidentifiable Employees

If a loss is alleged to have been caused by the dishonesty or fraud of any one or more of the Employees, and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the dishonesty or fraud of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the amount set forth in the Limits of Liability against the applicable Option.

Coverage Within Premises

II. (A) Of Money and Securities occurring within any of the Premises and caused by the actual destruction, disappearance or wrongful abstraction thereof; and

(B) Of other property or damage thereto (except by fire) caused by Robbery or Safe Burglary within any of the Premises, or attempt thereat, and damage (except by fire) to a locked cash register, cash drawer or cash box in the Premises caused by a felonious entry into such container, or attempt thereat; and for all damage (except by fire) to the Premises caused by Robbery or Safe Burglary or by burglarious entry into the Premises, or attempt thereat.

Insuring Agreement II shall not apply to loss, damage or destruction caused or contributed to by (1) forgery by whomsoever committed, or (2) any dishonest, fraudulent or criminal act, other than Robbery or Safe Burglary or attempt thereat, committed by any Employee, director or trustee of the Assured, whether acting alone or in collusion with others, or (3) the giving or surrendering of any Money or Securities in any exchange or purchase.

Coverage Outside Premises

III. (A) Of Money and Securities occurring outside the Premises and caused by the actual destruction, disappearance or wrongful abstraction thereof while being conveyed by a Messenger; and

(B) Of other property or damage thereto, caused by Robbery or attempt thereat outside the premises while such property is being conveyed by a Messenger.

Insuring Agreement III shall not apply to loss, damage or destruction caused or contributed to by (1) forgery by whomsoever committed, or (2) any dishonest, fraudulent or criminal act, other than Robbery or attempt thereat, committed by any Employee, director or trustee of the Assured, whether acting alone or in collusion with others, or (3) the giving or surrendering of any Money or Securities in any exchange or purchase.

Safe Deposit Box Coverage

IV. Of Securities caused by the actual destruction, disappearance or wrongful abstraction thereof from within a leased safe deposit box or boxes in any burglarproof vault in the Premises of the Depository designated herein or

from within the said Premises of the Depository while the Securities are temporarily outside the safe deposit box or boxes, excluding all loss caused or contributed to by (1) any dishonest, fraudulent or criminal act of any Employee, director, trustee or authorized representative of the Assured, whether acting alone or in collusion with others, or (2) the giving or surrendering of any Securities in any exchange or purchase.

Depositors Forgery Coverage

V. For its own account or for the account of any bank or banks in which the Assured has a checking or savings account, as their respective interests may appear, caused by forgery or alteration of, on or in any check, draft, bill of exchange, promissory note, or similar written promise, order or direction to pay a sum certain in money, made or drawn by, or drawn upon or as a direction to the Assured, or made or drawn by one acting as agent of the Assured, or purporting to have been made or drawn as hereinbefore set forth, including (a) any check or draft made or drawn in the name of the Assured, payable to a fictitious payee and endorsed in the name of such fictitious payee, (b) any check or draft procured in a face to face transaction with the Assured or with one acting as agent of the Assured by anyone impersonating another and made or drawn payable to the one so impersonated and endorsed by any one other than the one impersonated, and (c) any payroll check, payroll draft or payroll order made or drawn by the Assured, payable to bearer as well as to a named payee and endorsed by any one other than the named payee without authority from such payee, whether or not any endorsement mentioned in subdivision (a), (b) or (c) of this Insuring Agreement V be a forgery within the law of the place controlling the construction thereof; but excluding all loss caused by forgery or alteration of, on or in registered or coupon obligations issued or purporting to have been issued by the Assured, or any coupon attached thereto or detached therefrom, or Travelers Checks in whatsoever form drawn.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

Any loss or losses sustained by the Assured under this Insuring Agreement V shall be entitled to priority of payment over losses sustained by any bank aforesaid. In the event of claim hereunder by the Assured for the account of any bank or banks, the Company may adjust such claim either with the Assured or with such bank or banks, and payment of such claim to such bank or banks shall constitute full satisfaction of such claim by the Assured; but cases where the bank shall have already fully reimbursed the Assured for loss sustained shall be adjusted directly with the bank. The Company's total liability for losses under this Insuring Agreement V by whomsoever sustained shall be the limit of liability applicable to this Insuring Agreement V, subject to the provisions of Paragraph 9.

This Insuring Agreement V shall cover any loss or losses sustained by the Assured or any predecessor in interest of the Assured prior to its effective date but discovered thereafter within the time limit specified in General Agreement C, if such loss or losses would have been recoverable had this Insuring Agreement V been in effect at the time such loss or losses were sustained, subject to the following conditions all of which shall be conditions precedent to recovery as aforesaid:

(a) That the Assured or such predecessor carried Insuring Agreement V or some form of Forgery Bond or Policy of Forgery insurance (other than Fidelity insurance or suretyship) on the specific Office sustaining the loss, and

(b) That such other Forgery insurance was carried continuously from the time such loss was sustained to the effective date of this Insuring Agreement V, and

(c) That at the time of discovery of such loss the period of discovery of loss under all such prior Forgery insurance had expired, and

(d) That if the amount of insurance carried under this Insuring Agreement V is more or less than the amount of insurance carried under such prior Forgery insurance then the liability of the Company shall not exceed the smaller amount.

If the time for discovery of loss under any other terminated, canceled or expired bond or policy of Forgery insurance issued by the Company has not expired at the time Insuring Agreement V becomes effective, then liability under this Policy shall not be cumulative in amounts with liability under such other Forgery bonds or policies and shall not exceed in the aggregate, in any event, the larger or largest amount.

(c) That at the time of discovery of such loss the period of discovery of loss under all such prior Forgery insurance had expired, and

(d) That if the amount of insurance carried under this Insuring Agreement V is more or less than the amount of insurance carried under such prior Forgery insurance then the liability of the Company shall not exceed the smaller amount.

If the time for discovery of loss under any other terminated, canceled or expired bond or policy of Forgery insurance issued by the Company has not expired at the time Insuring Agreement V becomes effective, then liability under this Policy shall not be cumulative in amounts with liability under such other Forgery bonds or policies and shall not exceed in the aggregate, in any event, the larger or largest amount.

GENERAL AGREEMENTS

LIMITS OF LIABILITY

A. The limit of the Company's liability as specified in the table of Limits of Liability, regardless of the number of years this Policy shall continue in force or the number of annual or periodical premiums which shall be payable, or paid, shall not be cumulative from year to year, or from period to period, and shall not be increased by the inclusion herein of more than one Assured.

LIMITATIONS OF COVERAGE

B. Insuring Agreements II, III and IV apply only to such loss and damage caused by any act or event as aforesaid, committed or occurring within any of the States of the United States of America, the District of Columbia, Alaska, Hawaii, Canada, Newfoundland, Virgin Islands or Puerto Rico. None of the Insuring Agreements shall apply to loss, destruction or damage caused or contributed to by any dishonest, fraudulent or criminal act committed by a partner of the Assured, whether acting alone or in collusion with others. Insuring Agreements II, III and IV shall not apply to loss, destruction or damage (1) caused by war, whether declared or not, invasion, insurrection, rebellion, revolution, hostilities, or military or usurped power; (2) to manuscripts, records, accounts, plate glass or lettering or ornamentation thereon.

DISCOVERY PERIOD

C. The insurance afforded by Option A of Insuring Agreement I and by Insuring Agreements II, III, IV and V of this Policy shall apply only to such loss or damage which shall be discovered prior to the expiration of one year, and the insurance afforded by Option B of Insuring Agreement I shall apply only to such loss which shall be discovered prior to the expiration of two years, from the effective date of cancelation of the Policy as provided in Paragraph 13 or from the effective date of cancelation or termination of the Policy in any other manner. If, prior to the cancelation or termination of this Policy, insurance as to any Employee shall be canceled as provided in Paragraph 12, or if Option A of Insuring Agreement I or any of Insuring Agreements II, III, IV or V shall be canceled as provided in Paragraph 13, there shall be no liability under this Policy on account of any loss under the said Option A caused by such Employee nor under such canceled Insuring Agreement, unless discovered before the expiration of one year from the effective date of such cancelation, nor on account of any loss under Option B of Insuring Agreement I unless discovered before the expiration of two years from such date of cancelation as to such Employee or from such date of cancelation or termination of said Option B, as the case may be.

JOINT ASSURED (not applicable where there but one assured)

D. If more than one person, firm, corporation or other interest is named herein as Assured, the interest first named shall be the authorized representative or trustee for each and all of the other Assured and shall act as such in their behalf for all the purposes of this Policy. Knowledge possessed or discovery made by any Assured or by any partner or officer thereof shall for the purposes of Paragraphs 5, 6 and 12 constitute knowledge or discovery by the first named Assured and all of the other Assured and cancelation of the insurance hereunder as respects any Employee upon discovery as provided in Paragraph 12 shall apply to all the Assured. Written notice to or by the first named Assured shall constitute such notice to or by all Assured for all the purposes of this Policy. Acceptance by the first named Assured of any endorsement issued as provided in Paragraph 14 shall constitute

Plaintiff's Exhibit 6

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

For Forty-Seven Weeks Ended October 22, 1949:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price x excess shrinkage)
Fresh Pork	(1) 9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57
Smoked Pork:									
Smoked pork		2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72
Sliced bacon		460,829	225 760 45	.48990	6,169	-o-	-o-	6,169	3 022 19
Total smoked pork		2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91
Beef Carcasses	(2) 3,704,785	3,295,430	$ 1 441 274 82	$ .43736	14,101	½	18,524	4,423*	$ 1 934 44*
Veal Carcasses	(3) 155,444	148,972	$ 68 533 13	$ .46004	2,860	½	777	2,083	$ 958 26
Sausage:									
All loaves		274,309	$ 127 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73
Fresh sausage		389,242	139 505 75	.35840	2,086*	2	7,789	9,875*	3 539 20*
Smoked sausage		1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99
Total sausage		2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52
Total for 47 weeks ended 10-22-49		12,336,970	$ 5 010 858 42	$ .40617	464,972		201,655	263,317	$ 104 183 82

For Forty-Eight Weeks Ended September 30, 1950:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price x excess shrinkage)
Fresh Pork	(1) 17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04
Smoked Pork:									
Smoked hams		1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61
Slab bacon		684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64
Smoked calas		263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02
Smoked - other		260,338	60 024 15	.23056	6,668*	1½	3,905	10,573*	2 437 71*
Sliced bacon		413,082	183 779 89	.44490	2,325*	-o-	-o-	2,325*	1 034 39*
Total smoked pork		2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17
Beef Carcasses	(2) 4,136,023	3,544,052	$ 1 568 799 48	$ .44266	36,237	½	20,680	15,557	$ 6 886 46
Veal Carcasses	(3) 200,920	189,295	$ 89 660 17	$ .47365	4,755	½	1,005	3,750	$ 1 776 19
Sausage:									
All loaves		300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38
Fresh sausage		363,318	122 132 89	.33616	3,115	2	7,266	4,151*	1 395 40*
Smoked sausage		1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24
Total sausage		2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22
Total for 48 weeks ended 9-30-50	21,406,430	18,954,245	$ 6 796 093 11	$ .35855	395,413		238,447	156,966	$ 56 855 08

Notes:

1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
2. Beef carcass weight is dressed weight after deducting 2% allowance for cooler shrinkage.
3. Veal carcass weight is dressed weight after deducting 2% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, beef and veal, and as a percentage of sales weight for the other items.

*Denotes figures in red

PLAINTIFF'S EXHIBIT 10

LETTERHEAD OF JOHN L. MACBETH COMPANY
INSURANCE

September 18, 1950

Abe Solomon
Sucher Packing Co.
400 North Western Avenue
Dayton, Ohio

Dear Mr. Solomon:

Pursuant to our telephone conversation it will not be necessary for you to make further formal notification of the bond loss which you reported to us September 10, as we have already passed notice of this claim on to our attorneys, Pickrel, Schaeffer & Ebeling and they have notified the company, which satisfies the requirements of the policy.

Frankly, the provision in the policy is primarily for protecting the company's privilege of investigation immediately after the discovery of the loss by the assured, whereas this privilege might be jeojardized to the detriment of the company if prompt notice is not given.

We will be glad to render any assistance in working out your claim if you will contact us when you have occasion to use our services in this regard.

Very truly yours,

_____

JOHN L. MACBETH CO.

JLB/p

PLAINTIFF'S EXHIBIT 11a

PROOF OF LOSS
to
MANUFACTURERS CASUALTY INSURANCE COMPANY

I, Abe Solomon, Treasurer of The Sucher Packing Company, of 400 North Western Avenue, Dayton, Ohio, the assured, under Policy No. 69499 issued by Manufacturers Casualty Insurance Co., which policy was in effect the 1st day of November, 1947 and thereafter, do hereby certify,

That said The Sucher Packing Co. suffered a loss through the dishonesty of Willie Earley, employed as a janitor; Robert Maiden, employed as a butcher; Helen Hurt, employed in general service; James Jackson, employed as a butcher; William Harris, employed as a killing floor laborer and truck driver, all so employed by the said assured, and other employes of said assured, whose identity is unknown at this time to said assured, and

That the entire amount of money and property dishonestly misappropriated by said persons above named and above described as of unknown identity, amounts to One Hundred Sixty-two Thousand Nine Hundred Seventy-three and 34/100 Dollars ($162,973.34), and that the following is a detailed statement of said loss and of all sums due and owing said employes of known identity, above named, and the balance stated below is the correct amount of the net loss from November 25, 1948 to September 11, 1950,

That the said dishonesty of the said employes, both named and of unknown identity above mentioned, consisted of misappropriating property of the assured, their employer. during the period above mentioned, consisting of Fresh Pork of the fair reasonable market value of Eighty-five Thousand Six Hundred Seventy-three and 61/100 ($85,673.61) Dollars, Smoked Pork of the fair reasonable

market value of Fifty-five Thousand One Hundred Thirty-two and 08/100 ($55,132.08) Dollars, Beef, and Veal Carcasses of the fair reasonable market value of Nine Thousand Six Hundred Twenty and 91/100 ($9,620.91) Dollars, and Sausage of the fair reasonable market value of Twelve Thousand Five Hundred Forty-six and 74/100 ($12,546.74) Dollars, or a total fair reasonable market value of One Hundred Sixty-two Thousand Nine Hundred Seventy-three and 34/100 ($162,973.34) Dollars.

I hereby further certify that all sums otherwise owing to said employes by way of salary or other credits are as follows:

James Jackson .....$47.25 for salary
Robert Maiden .....$56.27 for salary
William Harris .....$36.02 for salary
Willie Earley .....$35.34 for salary
Helen Hurt .....$21.87 for salary
Helen Hurt .....$11.25 deduction from salary towards purchase of United States Savings Bond,

making a total of credits otherwise due said employes of Two Hundred Eight ($208.00) Dollars.

I further certify that knowledge of said misappropriations came to said assured and to the undersigned on or about the 11th day of September, 1950, that all of said employes above named, whose identity is known, except Willie Earley, have been continuously in the employ of said assured for a period beginning prior to November 1, 1947, and continuing to September 11, 1950, and that the said Willie Earley has been continuously in the employ of said assured for a period beginning approximately June 1, 1950 and continuing until September 11, 1950, that all of said employes above named and those whose identity is now unknown, misappropriated the property of the said assured, above

Plaintiff's Exhibit 11a

specified, of the fair reasonable market value above stated, between the said dates of November 25, 1948 and September 11, 1950, to their own use and benefit with intent to deprive the assured of the same, and that the said amounts have not been paid or satisfied in any way to said assured notwithstanding that due and legal demand has been made by the said assured upon said known employes for the same;

Further, that there are no offsets whatever against said claim for salary, commissions or otherwise, other than as set forth particularly on the above statement and that the said assured has fully complied with all the conditions of said policy above mentioned in connection with said employes and said misappropriations, and that said assured has not accepted any security for or on account of same; that the net amount due said assured from the said Manufacturers Casualty Insurance Co. under said policy by reason of said misappropriations, is One Hundred Sixty-two Thousand Seven Hundred Sixty-five and 34/100 ($162,765.34) Dollars.

(Signed) Abe Solomon

Sworn to before me and subscribed in my presence by the above named Abe Solomon, personally, this 3rd day of January, 1951.

Lee Bortz, Notary Public.

(Seal)

PLAINTIFF'S EXHIBIT 12

LETTERHEAD OF MANUFACTURERS CASUALTY INSURANCE COMPANY

January 5, 1951

Abe Solomon, Treasurer
The Sucher Packing Company
P. O. Box No. 975
Dayton 1, Ohio

Re: 02S-2352 — Bond 69499

Dear Mr. Solomon:

We acknowledge receipt of proof of loss dated January 3, 1951 presenting a claim under our bond 69499. This matter will have our prompt attention.

Very truly yours,

(Signed) Wm. H. Loesche, Jr., Counsel

WHL.m

Plaintiff's Exhibit No. 15

EXACT ACTUAL INVENTORIES:

Week Ended	Beginning Inventory	Purchases & Transfers In	Total	Sales	Ending Inventory Computed	Ending Inventory Actual	Loss	Gain
Nov. 5	40	50	90	55	35	33	2	
Nov. 12	33	60	93	50	43	42	1	
Nov. 19	42	45	87	40	47	45	2	
Nov. 26	45	50	95	45	50	49	1	
Totals		205		190			6	

ESTIMATED INVENTORIES (Except at Beginning and End):

	Beginning Inventory	Purchases & Transfers In	Total	Sales	Ending Inventory Computed	Ending Inventory Estimated	Loss	Gain
Nov. 5	40	50	90	55	35	30	5	
Nov. 12	30	60	90	50	40	42		2
Nov. 19	42	45	87	40	47	43	4	
Nov. 26	43	50	93	45	48	49	1	
Totals		205		190			6	

Beginning Inventory	40
Add - Purchases and transfers in	205
	245
Less - Sales	190
Computed Inventory	55
Actual Inventory	49
Loss	6

PLAINTIFF'S EXHIBIT 17

LETTERHEAD OF PICKREL, SCHAEFFER & EBELING – LAWYERS

March 30, 1951

Sucher Packing Company
400 North Western Avenue
Dayton, Ohio

Attention: Mr. Abe Solomon

Re: Bond Claim No. 02S-2352
Sucher Packing Co. v.
Manufacturers Casualty Insurance Company

Gentlemen:

Since the meeting with you, Mr. Beerman, other officials of the Sucher Packing Company and Mr. William H. Loesche of the Manufacturers Casualty Insurance Company, a great deal of consideration has been given to your ideas regarding the amount of the loss you sustained and reported under date of September 11, 1950.

It is sincerely regretted that we cannot consider your demands favorably as we feel definitely that this contract was not intended to insure losses occurring through inventory shortages which could not be conclusively proven. We do not feel that the auditor's report marked "Exhibit A", which has been submitted to us, is conclusive proof as it does not exclude all other possible causes of such losses. At most, the auditor's report shows only the possible extent of the loss. It does not prove conclusively that the loss occurred through dishonesty of the employees.

We do think that a loss in a modest amount has been proven conclusively to have been caused by employee dishonesty. By taking a liberal interpretation of all the statements that

Plaintiff's Exhibit 17

have been obtained, we find the following items and amounts as being lost within the terms of the bond.

31 hams averaging 14 lbs. valued at 52c per lb. as stated in Sucher's auditor's report	$225.68
2 pork loins averaging 6 lbs. at 38c per lb., listed as fresh pork in the audit	4.56
10 slabs of bacon, averaging 10 lbs. valued at 48c per lb. in the auditor's report	48.00
30 lbs. of beef at 43c per lb.	12.90
Total	$291.14

In meeting the obligation of our client, we have enclolsed draft in the amount of $291.14 in payment of this loss.

Yours very truly,

PICKREL, SCHAEFFER & EBELING

(Signed) Lamont N. Rennels

LNR/jw
enc.

Plaintiff's Exhibit 21

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

For Forty-Seven Weeks Ended October 22, 1949:

Item		Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) (x excess shrinkage)
Fresh Pork	(1)	9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57
Smoked Pork:										
Smoked pork			2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72
Sliced bacon			460,829	225 760 45	.48990	6,169	-0-	-0-	6,169	3 022 19
Total smoked pork			2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91
Sausage:										
All loaves			274,309	$ 121 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73
Fresh sausage			389,242	139 505 75	.35840	(2,086)	2	7,789	(9,875)	(3 539 20)
Smoked sausage			1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99
Total sausage			2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52
Total for 47 weeks ended 10-22-49			8,892,568	$ 3 501 050 47	$ .39371	448,011		182,354	265,657	$ 105 160 00

For Forty-Eight Weeks Ended September 30, 1950:

Item		Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) (x excess shrinkage)
Fresh Pork	(1)	17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04
Smoked Pork:										
Smoked hams			1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61
Slab bacon			684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64
Smoked calas			263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02
Smoked - other			260,338	60 024 15	.23056	(6,668)	1½	3,905	(10,573)	(2 437 71)
Sliced bacon			413,082	183 779 89	.44490	(2,325)	-0-	-0-	(2,325)	(1 034 39)
Total smoked pork			2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17
Sausage:										
All loaves			300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38
Fresh sausage			363,318	122 132 89	.33616	3,115	2	7,266	(4,151)	(1 395 40)
Smoked sausage			1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24
Total sausage			2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22
Total for 48 weeks ended 9-30-50			15,220,898	$ 5 137 633 46	$ .33754	354,421		216,762	137,659	$ 48 192 43

Notes:
1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, and as a percentage of sales weight for the other items.

( ) Denotes red figures.

THE SUCHER PACKING COMPANY
COMPUTATION OF EXCESS SHRINKAGE AND RESULTING UNEXPLAINED LOSS

(P. 242a)

THE SUCHER PACKING COMPANY
ADJUSTMENTS AND REVISED CLAIM

Plaintiff's Exhibit

For Forty-Seven Weeks Ended October 22, 1949:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained loss (average selling price) x excess shrinkage	Deduction For Meat Used In Employees' Cafeteria	Deduction For Last Three Weeks In Sept. 1950	Net Amount of Loss After Deduction For Cafeteria Meat and Three Weeks of Sept.
Fresh Pork	(1) 9,758,144	3,970,944	$ 1 526 981 04	$ .38372	199,100	½	48,791	150,309	$ 57 676 57	$ 920 93		$ 56 755 64
Smoked Pork:												
Smoked pork		2,222,953	$ 929 182 63	$ .41799	118,654	1½	33,344	85,310	$ 35 658 72	(2400 lbs. @ .38372)		
Sliced bacon		460,829	225 760 45	.48990	6,169	-0-	-0-	6,169	3 022 19			
Total smoked pork		2,683,782	$ 1 154 943 08	$ .43034	124,823		33,344	91,479	$ 38 680 91			$ 38 680 91
Sausage:												
All loaves		274,309	$ 121 406 99	$ .44259	17,996	5	13,715	4,281	$ 1 894 73			
Fresh sausage		389,242	139 505 75	.35840	2,086*	2	7,789	9,875*	3 539 20*	(2400 lbs. .40)		
Smoked sausage		1,574,291	558 213 61	.35458	108,178	5	78,715	29,463	10 446 99	$ 960 00		$ 7 842 52
Total sausage		2,237,842	$ 819 126 35	$ .36603	124,088		100,219	23,869	$ 8 802 52			
Total for 47 weeks ended 10-22-49		8,092,568	$ 3 501 050 47	$ .39371	448,011		182,354	265,657	$ 105 160 00	$ 1 880 93		$ 103 279 07

For Forty-Eight Weeks Ended September 30, 1950:

Item	Carcass Weight Processed lbs.	Sales lbs.	Sales dollars	Average Selling Price dollars	Weight Shrinkage lbs.	Normal Shrinkage % (4)	Normal Shrinkage lbs.	Excess Shrinkage lbs.	Unexplained Loss (average selling price) x excess shrinkage	Deduction For Meat Used In Employees' Cafeteria	Deduction For Last Three Weeks In Sept. 1950	Net Amount of Loss After Deduction For Cafeteria Meat and Three Weeks of Sept.
Fresh Pork	(1) 17,069,507	10,361,164	$ 3 229 165 54	$ .31166	175,180	½	85,348	89,832	$ 27 997 04	$ 920 93	$ 1 749 81	$ 25 326 30
Smoked Pork:												
Smoked hams		1,077,348	$ 553 755 60	$ .51400	27,239	1½	16,160	11,079	$ 5 694 61			
Slab bacon		684,598	247 508 67	.36154	37,673	1½	10,269	27,404	9 907 64			
Smoked calas		263,959	92 639 99	.35096	16,271	1½	3,959	12,312	4 321 02			
Smoked - other		260,338	60 024 15	.23056	6,668*	1½	3,905	10,573*	2 437 71*			
Sliced bacon		413,082	183 779 89	.44490	2,325*	-0-	-0-	2,325*	1 034 39*			
Total smoked pork		2,699,325	$ 1 137 708 30	$ .42148	72,190	1½	34,293	37,897	$ 16 451 17		1 028 19	15 422 98
Sausage:												
All loaves		300,311	$ 128 853 75	$ .42907	18,070	5	15,016	3,054	$ 1 310 38			
Fresh sausage		363,318	122 132 89	.33616	3,115	2	7,266	4,151*	1 395 40*			
Smoked sausage		1,496,780	519 772 98	.34726	85,866	5	74,839	11,027	3 829 24			
Total sausage		2,160,409	$ 770 759 62	$ .35677	107,051	5	97,121	9,930	$ 3 744 22	$ 960 00	234 00	2 550 22
Total for 48 weeks ended 9-30-50		15,220,898	$ 5 137 633 46	$ .33754	354,421		216,762	137,659	$ 48 192 43	$ 1 880 93	$ 3 012 00	$ 43 299 50

Notes:
1. Fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage.
4. Normal shrinkage is expressed as a percentage of carcass weight processed in the case of fresh pork, and as a percentage of sales weight for the other items.

* Denotes figures in red

Total for both periods	$ 146 578 57
Deduct payments withheld from Harris, Jackson, Maiden, Hurt and Farly	208 00
Adjusted amount of claim	$ 146 370 57

Product Analysis — WE 2-4-50

Typical Weekley Product Analysis Sheet from Plaintiff's Exhibit 4 (P. 243a)

		Opening Inventory Wt	Opening Inventory Cwt		Purchases Wt	Purchases Cwt	Pond Packings & Supplies	Transfers Wt	Transfers Cwt		Sales Wt	Sales Cwt		Transfers Wt	Transfers Cwt	Closing Inventory Wt	Closing Inventory Cwt		Shrinkage	Natural Profit
Fore Cattle	53	56377	93259	18	111340	199193							119	114157	200648	57560	91977			
Freight & Other Charges			2552			7049									6419		3082			
Beef Offal		9121	57426						128608		4442	9357		1600	24573	9009	55615			10521
Beef Carcass & Cuts		57617	200632				11000	58160	1763071		45998	1772890		16011	497652	38063	1283483			
Fabricated Beef		17292	47310		4765	139113					2052	103788				12900	430762		1980	246769
Beef Skins									108820		7435	17699								20879
Total Beef			318552			2141955	11000		2060999		78957	3019952			733102		769219			307507
Live Veal				22	4355	13686							22	4355	13686					
Veal Offal		81	558						10057		182	13493				13	709			2769
Veal Carcass		4946	27650				500	2565	115577		5265	270747		132	4755	1606	78531		345	11714
Veal Skins									9800		366	11401								1601
Total Veal			32034			13686	500		135434		5716	295841			141071		79240			11046
Total Pork			1059815			5651188	124500		9655592		243697	7035136			1007775		9800838			82620
Sausage Raw Meats		13762	37335					2456	567317					26[illegible]	601533	11370	339597		100	1422
Natural Casings			46349			4985			11005			3625			65322		460193			3246
Ex Kings			80124												18055		78045			2713
Spices			32846			5516									37671		34478			5543
Veal Loaf		5557	19860				500	3357	79353		4952	194777				3702	174321		320	4109
Frankfurt Sausage		3179	8589				1000	4559	98006		5556	183759			2671	1610	47601		68	6497
Smoked Sausage		16248	46618				20000	2510	24627		24300	783141			16342		476573		1016	23481
Total Sausage			268841			16510	30000		131539		34810	1163332			733010		2588761			34017
Sundries		7080	25130				1000	856	6676		5139	192874				5770	21330			8600
Total Plant			1735232			8461796	167000				414170	11759035					15373659			1571895

Note not on original exhibit: Circled figures represent shrinks in Shrinks or Gains Column. Uncircled figures represent gains in Shrinks or Gains Column. Cured meats gain weight due to curing process.

See Next Page for Pork

Product Analysis WE 2-4-50

Pork Only

	Open Inventory Wt	Open Inventory Cost	Purchases Wt	Purchases Cost	Prod Packages & Supplies	Trans fers In Wt	Trans fers In Cost	Trans fers Out Wt	Trans fers Out Cost	Sales Wt	Sales Cost	Trans fers Out Wt	Trans fers Out Cost	Close Inv 167 Wt	Close Inventory Cost	Shrink Gain	Natural Cost
Fresh Hogs	504450	830731	30810	52						5214	7474	1401 316770	5867615	34470	660077		
Pork Offal	24408	32575					164		164731					1939	20555	36309	41000		18818
Fresh Pork	178892	359654	9467	38580	10000	29394	51435	29394	51435	16575	48337	80		74759	137763	168337	330040	(4082)	412953
Lard	21558	58240			6500	30554	2740	30554	2740	2360	2254					72256	65487	(176)	25349
Total Pork	333308	532263	14477	56476	7500		55520		55520	197149	504970				65950		525558		457120
Cured Hams	36470	126732			300	12433	4980	12433	49897	140	792	33120	1276585	20605	655445	4962	283321
Picnics					1500	4590	1690	4590	16901			5330	131553			746	24070
Bellies	106625	225539			3000	13050	3100	13050	31037	392	7936	54330	1376466	76495	1372804	54332	1556902
Other	40154	51354			1500	990	990	990	9911	789	18396	4755	105715	34171	403122	(449)	234641
Smoked Hams	5147	21422			8000	26410	11425	26410	114255	21875	75929			5598	377466	(764)	1950
Bellies	10791	31506			5000	4536	13766	4536	13766	5547	16952			45346	135985		
Shipped Bellies	10410	33436												8790	45240	(5978)	(137154)
Smoked Cales	2095	6755			1000	4672	1340	4672	13483	2673	8418	8002	255792	3914	109592	(166)	(8562)
Smoked Other	3445	5252	157	1476	5000	40000	16500	40000	16591	4359	8046			2798	87884	(465)	(5653)
Sliced Bacon	3552	12906			7500	2340	7500	2340	7246	7254				4176	133642	31	53655
BB Hams Raw					1580	155	1580	155				70	630	300	16500		
Trimmed	1737	12771			2385		2385			2727	7247			1035	72450	(162)	846
Total Processed Pork	216566	525755		1476	50000		410611		410615	45948	185066		3147994		4772280		3697600
Total Pork Department		1057515		1576545	124800		96888		96888	243097	765036		10007775		9800538		8269200

AFFIDAVIT OF JEROME GOLDMAN
(Filed July 11, 1956)

United States of America,
State of Ohio,
Hamilton County, SS:

Jerome Goldman, being first duly sworn, says he is the attorney for appellant in the above-entitled case, and was attorney in the trial of the above-entitled case in the United States District Court.

Affiant says, as shown by the typewritten transcript of the proceedings of the trial at pages 1136 to 1138 of the same, found at pages 208a and 209a of appellant's Appendix, before final argument, the Trial Court instructed the Jury it was not to consider any evidence of inventory shortage, and further that such evidence was not to be used by the Jury as any measure in determining any loss to plaintiff.

Affiant further says that after such action taken by the Court, counsel for defendant at the trial, requested a realignment of the Exhibits, and that the Court then stated at page 1138 of the typewritten transcript below (page 210a of appellant's Appendix):

> "It is correct that only those exhibits which will be pertinent to the issue now before the Jury should be submitted to the Jury, if you can ascertain this before the case goes to the Jury."

Thereupon counsel for defendant and counsel for plaintiff, pursuant to the Court's instruction, during a recess in the proceedings prior to the submittal of the case to the Jury, separated from all the exhibits that had been admitted in evidence, the following: Plaintiff's Exhibits 1A, 2, 3, 4, 6, 14, 14A, 14B, 14C, 16A, 16B, 16C, 21, and 22, and Defendant's Exhibits G, H, I, J, K, L, V and W, and the

aforesaid Exhibits so separated were not transmitted to, but withheld from, the Jury.

Affiant makes this Affidavit to supply an omission in the record of part of the trial proceedings which did not occur in the presence of the trial Judge and therefore was not included in the typewritten transcript of the proceedings below.

/s/ Jerome Goldman

Sworn to before me and subscribed in by presence this 11th day of July, 1956.

/s/ Julian Rubin,
Notary Public.

No. 12815

In the

United States Court of Appeals

For the Sixth Circuit

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE CO.,

Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division

APPELLEE'S BRIEF AND APPENDIX

WILLIAM G. PICKREL,
WILLIAM H. SILVA,
Attorneys for Appellee.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss", and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced?

The Trial Court said "Yes".

Appellee agrees.

II.

May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed

pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".

Appellee agrees.

III.

Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings of facts not included in the questions propounded in the special verdict?

The Trial Court said "Yes".

Appellee agrees.

IV.

Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".

Appellee agrees.

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Counter Question No. 1:

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss" and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced.

The Trial Court said "Yes".

Appellee agrees 6

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Counter Question No. 2:
May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".
Appellee agrees 16

Counter Question No. 3:
Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings on facts not included in the questions propounded in the special verdict?

The Trial Court said "Yes".
Appellee agrees 18

Counter Question No. 4:
Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".
Appellee agrees 20

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In the

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. ———

THE SUCHER PACKING CO.,

Appellant,

vs.

MANUFACTURERS CASUALTY INSURANCE CO.,

Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division

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APPELLEES BRIEF

COUNTER STATEMENT OF FACTS

Appellant does not undertake to state the facts in clear, concise, chronological order, but intermingles opinions, arguments, statements and conclusions which are frequently unsupported by the record.

Plaintiff on the day of trial withdrew beef and veal losses from consideration of the Jury because "its records of such losses were wholly unreliable" and still, plaintiff now relies on alleged disappearance of beef and veal products as evidence of employee dishonesty.

Appellant, while contending that careful and detailed records were kept to show the disposition of the product from slaughter to sale, omits to inform this Court that according to the testimony of plaintiff's employees who were in charge of its packing plant:

(a) The alleged unexplained inventory loss was determined by adding the alleged gains and shrinks shown in each approximate weekly inventory (7b, 8b) submitted for each period, subtracting the gains from the shrinks and labeling the remainder "unexplained loss" (38b, 40b, 41b). No audit being attempted (15b, 41b).

(b) The alleged unexplained loss or shrink could come from errors in transfer, errors in taking the inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or theft (12b, 26b, 27b, 28b, 37b, 38b, 39b, 42b).

(c) The shortage complained of was based upon approximate inventories (7b, 8b, 19b).

(d) Plaintiff's auditor would not give his unqualified certificate to any of the figures contained in the weekly production analysis sheets from which the inventory loss was prepared (44b).

(e) Plaintiff had no records to show its shrink experience (6b, 20b, 52b, 53b) as plaintiff was never concerned with shrink (42b) and shrink experience was never determined from any audit (41b) and no shrink tests were made (47b, 48b).

(f) There were no figures set up and charged to theft on plaintiff's records (43b).

(g) The only accurate inventory was that taken by the auditors at the fiscal close and this inventory was never given to the accountant who prepared the inventory shortage (7b, 24b, 25b, 26b). (The auditor's inventory prepared at the fiscal close was frequently demanded but never produced during the trial.)

(h) That there were substantial shrink shortages for the weeks immediately after Harris was apprehended on September 11, 1950, (23b) and plaintiff's analysis sheets still provide for weekly shrinks and gains (30b, 43b).

(i) There were no records kept by plaintiff of the meat employees were permitted to use in the cafeteria (26b, 48b, 49b).

(j) Plaintiff is unable to say what amount of meat anyone was charged with stealing (33b, 34b).

(k) That "gambrels", from which the hog is hung, were weighed with the hog as the hog entered the cooler and removed when the hog entered the cutting room (21b, 22b, 23b. Deft's. Ex. G). No credit was ever allowed for the weight of the "gambrels".

(l) There were no reports of anyone wrongfully removing meat from plaintiff's plant (30b, 46b, 47b).

(m) When Harris was apprehended plaintiff was just starting a count system to determine accuracy (51b).

(n) Air circulation, temperature, refrigeration, humidity, source and feeding of the hog all have a definite affect on shrinkage (53b, 54b, 55b, 56b). There were no records produced for the periods claimed, for any of these factors (53b).

(o) That plaintiff's records show that William Harris was employed July 26, 1950 (19b, 20b, 32b).

(p) Plaintiff refused to produce and offer the signed statement of James Jackson or any other employee even though defendant moved for such production (71b).

(q) Dressed whole hog sales were included in the inventory, but accurate records of such sales were not produced, although promised (22b) and the volume of bone removed in preparing pork hotel cuts was not known. (49b).

(r) William Harris never stated how many hams and bacons *were* placed in any barrel. He stated how many *could* be put in a container (19a).

These are just a few of the omissions on the part of plaintiff who was required, under the law, to establish the integrity, reliability and accuracy of the inventory figures which it relied upon to establish an unexplained inventory shrink in pounds, caused as a result of the default or acts of its employees.

One thing that plaintiff did remove as a cause of the unexplained inventory loss, according to Arthur Beerman, plaintiff's president, was theft (128a, 129a, 45b, 46b).

On September 11, 1950, plaintiff caught William Harris, one of plaintiff's employees, attempting to remove several hams and shoulders from plaintiff's plant. This meat was returned to stock and Harris was interrogated by Frances Merica, a detective of thirty-eight years experience, employed by plaintiff, who took signed statements from Harris, Jackson, Maiden, Early and Hurt, and interviewed all other plant employees and found one ham that had been taken from plaintiff's premises (46b).

On said date, plaintiff carried a fidelity insurance policy effective for three years, commencing November 1, 1947, with defendant and reported this attempted theft and, as a result of detailed investigation, it was determined that plaintiff had sustained a loss of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, having a total value of $291.14, which amount defendant offered to pay and tendered to plaintiff. (Plaintiff's Ex. 17).

On January 5, 1951, Proof of Claim covering a two-year period was received by defendant in which plaintiff claimed a loss in fresh pork of $85,673.61, Smoked pork of $55,132.08, Beef and Veal of $9,620.91 and Sausage of $12,546.74, a total of $162,973.34 (Plaintiff's Ex. 11A).

On September 2, 1952, almost two years after Harris was apprehended, plaintiff filed its petition in which it claimed a loss of meat products, during the *three* year period beginning November 1, 1947, consisting of $85,673.61 on fresh pork; $55,132.08 on smoked pork; $9,620.91 on beef and veal and $12,546.74 on sausage, a total of $162,973.34, based on the difference between approximate pound gains and shrink from weekly production sheets.

Thereafter, plaintiff filed its amended complaint, and its first amended complaint in which it continued to contend that its loss during the *three* year period from November 1, 1947, was as stated in its original petition.

On November 29, 1955, the first day of trial, plaintiff filed its second amended complaint in which it changed its claim of loss of fresh pork from $85,673.31 to $82,081.94; of smoked pork from $55,132.08 to $54,103.89; of sausage from $12,546.74 to $10,392.74; of beef and veal from $9,620.91 to $0., a total of $146,370.57, but continued to maintain that such loss occurred over a period of *three* years beginning November 1, 1947.

During the trial, plaintiff's second amended complaint was amended at bar by reducing the period of claimed loss from *three* years beginning November 1, 1947, to the period from November, 1948, to September 11, 1950. The amount claimed of $146,370.57 remained unchanged at least for a few days, until plaintiff discovered that it had charged defendant with shrink in pork products of 21,408 pounds arising between September 11 and 30, 1950, having a value of $6,672.02 on which plaintiff allowed defendant a credit of $1,749.81 (24b).

On the final day of the trial, plaintiff's second amended complaint was again amended at bar by credit for three weeks (24b, 67b) and an allowance for meat consumed by employees in their cafeteria and these credits resulted in

the vacillating prayer being increased from $146,370.57 to $146,578.57. The unexplained inventory loss of approximate pounds was still as unexplained at the end of the trial as it was at the beginning.

ARGUMENT

I.

Is the Trial Court justified in withdrawing from the Jury's consideration inventory shortage based upon pound shrinkage shown on plaintiff's weekly production sheets which, according to the testimony of plaintiff's employees, are largely estimates of gains and shrink of meat products where the accurate actual record count contained on the inventory at the fiscal close taken by the auditors is not produced, nor are records of hog carcass sales and lard sales produced and there is no evidence of plaintiff's shrink experience or of the temperature and humidity maintained in the cooler, chill or other rooms in plaintiff's plant, the source of feed of animal and other factors affecting shrink and the inventory shortage was determined by simply adding the weight gains and shrinks shown for the selected weeks offered in evidence, subtracting one from the other and characterizing the remainder as "unexplained loss" and the only evidence of identifiable items stolen consisted of 31 hams, 2 pork loins, 10 slabs of bacon and 30 pounds of beef, and weight gains and shrinks experienced by plaintiff before and following the period of the alleged loss are not produced.

The Trial Court said "Yes".

Appellee agrees.

Appellant's question is predicated upon the erroneous hypothesis that the records of inventory pound shortage

were accurate and accounted for the complete disposition of the product in the honest course of business.

This hypothesis cannot be justified by the evidence which clearly discloses that the inventories were approximates.

It was the obligation of plaintiff to offer an inventory based on reliable, accurate figures, not on approximations and estimates which changed daily during the trial and are still so uncertain that plaintiff's accountant refused to certify his analysis as correct.

Appellant says that the most grievous error was the action of the Trial Court in excluding appellant's inventory records from the consideration of the Jury.

There were certain exhibits that counsel, by agreement, decided should not be sent to the Jury, but no record of the exhibits which were withdrawn was requested or was made and the Court was never requested to pass upon the relevancy of any exhibit which was withdrawn by counsel.

The record discloses that the following occurred:

(71b, 72b)

"MR. SELVA: May it please the Court, in view of defendant's present position, we respectfully request a realignment of the exhibits and respectfully request an order requiring plaintiff at this time to produce original statements of Helen Hurt, James Maiden, William Harris, James Jackson and Willie Early, for submission to the Jury.

"THE COURT: That motion will be overruled. It is correct that only those exhibits which will be pertinent to the issue now before the Jury should be submitted to the Jury, if you can ascertain this before the case goes to the Jury."

This Court will observe that there was no objection of record to this action of the Trial Court, nor was there any request made by counsel to have the Court rule on the individual exhibits being withdrawn by agreement of counsel.

nor was any attempt made to make any record of the exhibits which were submitted to, or withdrawn from, the consideration of the Jury. It was not thought to be of any importance at the time; counsel agreed on those exhibits that were to be withdrawn, but now predicates error upon acts which were never submitted to the Trial Judge. *Columbia Horse and Mule Commission* v. *American Ins. Co.* (6th Cir.) 173 F. (2d) 773.

THE EXHIBITS:

Appellant's exhibits were offered and admitted, then found to be unreliable and erroneous by defendant; whereupon, appellant changed and modified and offered new exhibits which were in turn found unreliable, for example, Exhibit 6 was introduced (114a), twelve copies given to the Jury so they could follow the testimony (114a) and during the testimony Exhibit 6 was discovered to contain beef and veal computations which had been withdrawn by counsel (45b). Therefore, Exhibit 6 was collected, redrafted and replaced by Exhibit 21 which, likewise, was determined to be inaccurate while being explained to the Jury and was likewise collected, amended, modified at the last moment by deducting an arbitrary amount for meat consumed by employees in the cafeteria and allowing a credit of $3,065.00 for losses of $11,442.41 which had been charged against defendant for the pound shortage for three weeks following September 11, 1950, and Exhibit 21, which was originally Exhibit 6, then became Exhibit 22 and let's look at Exhibit 22 (68b, 69b).

In the first period of forty-seven weeks plaintiff deducted three percent cooler shrink and charged defendant with 9,758,144 pounds of fresh pork, then plaintiff allowed a credit of 8,892,568 pounds sold during the period which, according to plaintiff's computation, left 865,567 pounds

Plaintiff then allowed a credit of 448,011 pounds weight shrinkage and this left a balance of 417,565 pounds of pork wholly unaccounted for in the first period of Exhibit 22.

In the second period of 48 weeks, defendant is charged with 17,069,507 pounds of fresh pork and is then given a credit of 15,220,898 pounds sold leaving a balance of 1,848,609 pounds. Plaintiff then credits a weight shrinkage of 254,421 pounds and, we have a balance of 1,494,188 pounds wholly unaccounted for during the second period of Exhibit 22.

This huge unexplained difference of 1,912,353 still remains after three revisions, modifications and amendments of this exhibit which first was 6, then 21, and now 22.

The other exhibits were introduced by the box full and were represented to be the 95 weeks of production analysis sheets from which Exhibit 22 was prepared so, it is obvious that these exhibits of disarranged periods without individual identification being offered by the box full were not only approximates, but erroneous to the extent of 1,912,353 pounds according to plaintiff's figures.

It is also of interest to note that on the basis of plaintiff's figures contained in its exhibit 22, plaintiff sets forth weight shrinkage of 448,011 pounds on 9,758,144 pounds processed during the incomplete first period of 47 weeks, slightly less than 5 percent but in processing 17,069,507 pounds during the incomplete second period of 48 weeks plaintiff allegedly sustained a weight shrinkage of 354,421 pounds, slightly less than 2¾ percent.

We also call this Honorable Court's attention to the fact that over four and one-half million pounds of pork were held in storage over weekends during the first period and over six million pounds of pork were held in storage over the weekends of the second period. It was conceded that for each day that meat was held in storage after the first

twenty-four hours, there is additional shrink but, although the records of plaintiff clearly shows this situation, no credit is allowed defendant for this additional shrink which is just ignored by plaintiff (Deft's. Ex. V).

These were the alleged reliable, accurate records which plaintiff wished to submit to the Jury which plaintiff's auditor refused to certify (15b, 44b).

This was the inventory shortage that Kenneth Smith, plaintiff's Vice-President, admitted was based upon approximate inventories (7b, 8b).

This was the inventory that plaintiff's Treasurer testified was prepared by the auditor who was never given the accurate inventory taken at the fiscal close (24b).

THE THEFTS:

Plaintiff wanted the Jury and Trial Court to believe that the alleged inventory pound loss of meat products was caused by theft by its employees and to do so, it was the obligation of plaintiff to eliminate causes for which the employees were not responsible.

Mr. Kenneth Smith, plaintiff's Vice-President, never saw anyone attempting to steal anything (61a). He had no records of anyone being caught stealing meat (61a).

Mr. Abe Solomon, plaintiff's Treasurer, neither saw nor received any report of anyone taking meat from plaintiff's plant (30b). He was unable to say what amount of meat anyone was charged with stealing (33b, 34b).

Mr. Ray McConkey, plaintiff's Plant Superintendent, had no knowledge of any employee taking any meat (47b).

Mr. Francis Merica, Plaintiff's Detective, never caught anyone taking anything (46b).

Mr. Arthur Beerman, plaintiff's President, saw one employee, sometime in 1948, taking some weiners out of the plant which amounted to 40 or 50 cents (130a).

Mr. **Beerman** said guards were added, windows closed, detectives worked inside the plant, locks were changed, persons were checked going in and out of the plant by hired guards (129a).

Mr. **Robert Hadeler**, plaintiff's accountant, admitted that the loss could be attributed to errors in transfer, errors in taking inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or from theft (38b, 39b).

It was obvious that the pound inventory loss could not be attributed to employee dishonesty.

THE SHRINK:

Of course meat shrinks, but plaintiff was never concerned with shrink (41b). There were no figures made from any audit to determine shrink (6b, 41b, 52b) and no shrink tests were made at plaintiff's plant (47b, 48b).

The testimony showed conclusively that plant conditions, equipment, air circulation, room temperature, refrigeration, humidity, source and feeding of animal all have a profound effect on the percentage the animal will shrink (53b, 54b, 55b, 56b) and plaintiff made no record of or offered evidence on any of these important factors (52b) and had even destroyed records of temperature for the period involved (53b).

While there was a gambrel included in the weight of each of the 2,000 hogs processed each week (21b, 22b, 23b, Deft's. Ex. G), no credit was ever allowed for the weight of the gambrel.

No allowance was made for millions of pounds of pork held over the weekend (65b, 66b, 69b).

Plaintiff failed to introduce any record of its shrink experience following September 11, 1950, so the shrink of the hog was still uncertain and speculative with the plaintiff attempting to repudiate its own record showing a cooler shrink of three percent on exhibit 22 (21b).

What was taken from the hog would certainly reduce its weight. Plaintiff admitted large quantities of pork was transferred to lard (22b, 37b 38b), but no lard figures were ever produced, nor was credit allowed (66b). However, for a four-week period in December, 1948, plaintiff's records disclosed it sold 198,048 pounds of lard receiving $41,275.13; for a four-week period in October, 1949, plaintiff sold 220,966 pounds of lard receiving $36,124.57; for a four-week period in November, 1949, plaintiff sold 208,206 pounds of lard receiving $29,178.16 and for the weeks ending August 19, 26, September 2 and 9, plaintiff sold 209,324 pounds of lard receiving $38,944.33 (Deft's. Ex. W).

Plaintiff admitted that this lard came from the fresh pork charged to defendant, but utterly failed to allow any credit.

Contained in the 9,758,144 pounds of pork charged to defendant during the first period and the 17,069,507 pounds of fresh pork charged to defendant during the second period, were millions of pounds of whole dressed hogs shipped from plaintiff's packing plant by the boxcar loads (5b). It was never contended by plaintiff that anyone ever took a whole hog, not even Harris. How many millions of pounds of whole hogs were shipped no one knows as these records, while promised, were never produced (4b, 5b, 6b, 22b, 91a). Under no circumstances, could this unknown millions of pounds of weight have been "unexplained loss" or inventory pounds of shortage. The only way these whole dressed hogs left the plant was in railroad box cars, but no record of whole carcass sales were produced.

Spoilage? The plaintiff never had any pork spoil — there were no figures in plaintiff's books for spoilage of meat. In 27 million pounds of processed meat, there was not one pound of spoiled meat.

The Trial Court surveyed this hodge podge of statistics, these variables, these various changes in exhibits which were offered as correct documents, the various averaged credits, the approximated inventories, the absence of the fiscal end inventory, the boxes full of exhibits (10b, 11b) the absence of records of material conditions that affect shrink, the refusal of the certified public accountant to certify his result, or the correctness of plaintiff's figures, the admission that the inventory shortage was as attributable to mistakes, spoilage, errors in transfer, improper shrinkage factors, errors in taking the inventory as from theft and, refused to allow the Jury to guess and speculate by withdrawing the inventory shortage from the consideration of the Jury which was the only thing he could do under the circumstances. The cases cited by plaintiff amply support the decision of the Trial Judge that a jury should not be allowed to guess and speculate on an approximate inventory, based on approximate shrinks and gains, in which approximate shortages could admittedly be the result of (a) errors in transfer, (b) errors in taking the inventory, (c) additional shrink due to spoilage, (d) mistakes, (e) improper shrinkage factors, or (f) from theft, particularly where the plaintiff failed to produce the accurate inventory taken at the end of the fiscal year (7b)a and failed and refused to produce other records in support of the inventory (4b, 5b, 6b, 13b, 14b, 16b, 24b, 26b, 68b, 70b), and failed to offer evidence to eliminate the causes for which defendant would not be responsible.

It will not be presumed that an injury arose from a cause from which a liability arises, when the fact of the injury is equally consistent with the presumption that it arose from one of several other separate and distinct causes which do not give rise to a liability. *Village of Willoughby* v. *Malone*, 122 O. S., 315. Allen, J.; *Gedra* v. *Dallmar Co.*, 153 O. S., 258, 91 N.E. (2d) 256.

Where a plaintiff produces evidence that is consistent with an hypothesis that there was no inventory loss resulting from employee infidelity and also one that there might have been, his proof tends to establish neither. *Ewing* v. *Goode*, (6th Cir.) 78 Fed. 442, 444.

One swallow does not make a summer. Neither does one frustrated attempted theft of a few hams and shoulders on a single occasion, even though committed by an employee of the plaintiff, establish that a claimed inventory loss of $162,937.24 or $146,370.57 or $146,578.57, or any other sum, sustained over a period of three years, or two years, or twenty-one months was occasioned by the theft or dishonesty of plaintiff's employees. *Lipman Brothers* v. *Hartford Accident & Indemnity Co.*, 100 Atl. (2d) 246.

The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong. *Storey Parchment Co.* v. *Patterson Paper Co.*, 282 U. S., 555, Syl. 6; where the damages are not the certain result of the default but are uncertain, contingent, conjectural or speculative, they cannot be made the basis of a recovery. *H. W. Caster and Sons Advertising Co.* v. *Grove Laboratories*, 58 F. S. 1011, Syl. 15. The appellant's inventory pound shortage was at all times wholly speculative, wholly uncertain, wholly unreliable and never shown to be the certain result of the acts of Harris or any other employee.

Where the evidence creates no more than a mere suspicion or surmise that some of the inventory shortage might have been due to employees' dishonesty, plaintiff cannot recover. *New Amsterdam Casualty Co.* v. *W. D. Felder & Co., Inc.*, 214 F. (2d) 825, Syl. 3 (cited by plaintiff) where, because there was *no* evidence showing any probability that the loss was occasioned in any other manner, the Court allowed the inventory figures to go to the Jury.

In *Stanley Company* v. *National Surety Corporation*, 39 N.Y.S. (2d) 509, 512, the Court said:

> "In addition to the amounts which these employees allegedly admitted taking, the plaintiff has attempted to prove that the loss sustained and covered by the bond amounted to at least the sum sought to be recovered in this action. This proof consists, in part, of the books and records of the restaurant corporation which, it is claimed, show the amount of money which should have been turned in, based upon the amount of food which is alleged to have been sold during the period in question. The attempted analysis of the books of the restaurant falls short of the required amount of proof to sustain the burden placed upon the plaintiff to establish the amount of any loss covered by the bond written by the defendant."

Evidence which shows simply that an injury may have resulted in the course of employment or may have been suffered in the regular course of nature is not evidence to support a workmen's compensation claim *Gerich* v. *Republic Steel Co.*, 153 O. S., 463, 92 N.E. (2d) 393; *Burens* v. *Industrial Commission*, 162 O. S., 549, 124 N.E. (2d) 724.

In *Anderson* v. *Mt. Clements Pottery Co.*, 328 U. S., 680, 66 S.Ct., 1187 (relied upon by plaintiff), it was the *employer* who failed to keep accurate records which led to the statement quoted by opposing counsel. Actually, the Court said in the fifth syllabus:

> "An *employer* who has not kept the records required by Section 11 (c) cannot be heard to complain that damages assessed against him lack the precision of measurement that would be possible had he kept such records."

So, too, plaintiff whose records were uncertain, contingent, speculative and conjectural, cannot complain that the Trial Judge refused to allow the Jury to guess and speculate over figures that plaintiff's certified public accountant refused to certify based wholly on approximates.

If there are other causes equally proximate, plaintiff cannot recover unless he shows the one he complains about was the real cause, otherwise the Jury would just be guessing at which was the cause *Ebhardt* v. *Safeway Stores*, 227 F. (2d) 379, 380, Col. 2.

COUNTER STATEMENT OF QUESTION II.

May the Trial Judge withdraw alleged loss caused by unidentifiable employees where there is no evidence that any unidentifiable employee removed any hams, shoulders or bacon from plaintiff's meat plant and there is no substantial evidence that any unidentifiable employee actually removed pork loins from plaintiff's plant and plaintiff's counsel removes sausage from the consideration of the Jury?

The Trial Court said "Yes".

Appellee agrees.

Appellant's statement that sausage and loin cuts were "stolen" by unidentifiable employees is unsupported by the evidence — Appellant's counsel said:

(726)

"and I may say to you also, in consideration of the case, at this point, sausage may be eliminated as the testimony of Harris, with respect to sausage is too indefinite. So, the case is now restricted and confined to fresh pork and smoked pork."

The testimony of Harris, an alleged off and on employee, whose record showed he was employed July 26, 1950, does not disclose any sausage or loins were wrongfully taken from plaintiff's plant.

Harris was asked:

(20a)

"Q Now how prevalent was the taking of meat by other employees?

"A I should say some left there every day."

We ask — left where?

(21a)

"Q You stated you saw a number of other employees whose names you do not know take meat products and put it in their pockets, small quantities?

"A That's right."

We ask — what meat products?

"Q The people you saw take the stuff were other employees?

"A That's right."

We ask — what stuff?

(22a)

"Q Any other persons besides Robert Maiden, Helen Hurt, Willie Early, James Jackson, yourself that you can name?

"A They was all involved with me. Rest of them took it out in their pockets.

"Q Those are the only ones involved with you?

"A That's right.

"Q And the others took it out in their pockets?

"A That's right.

"Q You say you don't remember the names of any of them?

"A No, I don't know their names."

We ask — took what?

Counsel continues his little game of uncertainty — just an inference on an inference — no one accused any unidentifiable employees of taking hams, shoulders and bacon from plaintiff's premises and the Court was justified in removing the loss alleged to have been sustained by unidentifiable employees from the consideration of the Jury, at least plaintiff-

appellant made no objection to the action of the Trial Court and himself withdrew sausage so, all that was really left were hams, shoulders and bacon.

COUNTER STATEMENT OF QUESTION III.

Under the facts in Question I, is the Trial Court permitted to submit a special verdict permitting the Jury to find upon the remaining issues in the case by answering specific questions and to make additional findings on facts not included in the questions propounded in the special verdict?

The Court said "Yes".

Appellee agrees.

Again, appellant's question is not supported by fact.

The Trial Court was permitted under Civil Rules of Federal Procedure 47(a), 28 U.S.C.A. to submit a special verdict, and at no stage of the proceedings was there any request by plaintiff to add one word to the special verdict.

Appellant says testimony that Harris worked two years was unrebutted.

Appellant said to the Jury:

> (Tr. 1184)
> "This is his testimony. He began work as a regular employee, as a permanent employee on July 26, 1950. Prior to that time he worked off and on as a day laborer and there is no evidence to the contrary.

Appellant provided the employment record of Harris showing he was first employed July 26, 1950; no other record was offered when demand was made (20b, 33b). During the Trial appellant repudiated its record by saying Harris was a spot laborer for around two years. The Court ac-

cepted appellant's record of regular employment and also allowed the Jury to find other dates of employment of Harris (215a, 216a).

Appellant made no objection to the use of the word "date" by the Trial Court. The Court could have used time, period, or any other term selected by appellant, equally well but counsel did not feel the word "date" was inappropriate at that time and no other word was suggested. Counsel's interpretation is also repudiated by the finding that Harris committed dishonest acts during the time of his regular employment according to the testimony and on three other occasions so, the Jury understood what the Trial Court meant by "dates".

While counsel objected to the form of the special verdict he made no objection to its substance, he offered no suggested amendments, no suggested changes, no request for additional findings.

What was the duty of counsel to stand idly by or to assist the Court by suggestions and additional questions if those submitted were not satisfactory to counsel — he did not request that the Jury make additional findings. Appellant did not contend any issue of fact was omitted. He acted negatively — not affirmatively, and he omits to inform this Court that the Trial Court said.

(217a) (74b)

"You are not limited to what is submitted here. If you find that other facts are important that you wish to make a finding on, considering the issues in this case, you may make additional findings that are not indicated in this document."

Counsel has taken a line here, a phrase there, unconnected and out of context, and, on such disjointed excerpts, based his conclusions which he wishes to impress upon this Court. He wholly ignored the requirements of Rule 49a of the Federal Rules of Civil Procedure, 28 U.S.C.A.

Not one case is cited which supports counsel's position that the Trial Court erred in the giving of the special verdict, or that counsel can stand idly by and then predicate error where no suggestion or request for modification, addition or correction has been made.

COUNTER STATEMENT OF QUESTION IV

Where a witness, who refuses to testify, has given a signed confession or statement to another witness can counsel ignore the signed statement and attempt to offer an alleged excerpt from the signed statement by calling the person who took the statement as his witness?

The Trial Court said "No".

Appellee agrees.

Appellant fails to advise this Court that appellant had in its possession at the trial an original signed statement taken from James Jackson by Officer Merica. This signed statement was never offered as a declaration against the proprietary or pecuniary interest of James Jackson, it was never even produced even though appellee requested that it be produced and offered in evidence. Instead, appellant attempted to have Officer Merica testify to an alleged phrase from the signed confession. Again appellant takes words out of context.

The cases cited by counsel do not support the proposition that an alleged phrase can be substituted for a signed statement given to the third party witness.

A review of the cases discloses that in one an affidavit was offered, in another a signed confession was involved, in another a suicide note was offered, in another a letter was offered. In none does it appeal that a single alleged sentence or part of a signed statement can be offered and the

balance withheld by the appellant. If appellant wanted to introduce the signed statement, he was invited to do so (71b, 72b).

It might be well at this time to note that under Question XI appellant contends that the Trial Court erred in not instructing the Jury that appellant *had no right* to introduce the statement in evidence. Appellant's counsel so stated to the Jury (212a).

We do not believe that the signed confession would have been competent against the defendant appellee if appellee chose to object to the introduction of the signed confession. *Jackson Paper Co. v. Hartford Accident & Indemnity Company*, 69 Southern (2d) 411; *Stanley Company, Inc. v. National Surety Corp.*, 39 N.Y.S. (2d) 509.

However, appellee asked that the signed confession or statement given by James Jackson be produced and offered in evidence, but appellant refused.

Appellant has thrown alleged questions at this Court which are as numerous as the falling leaves. We comment on the alleged questions presented in general by simply stating that appellant's questions 6, 8, 9, 11 and 12 are not supported by any authority and question 10 is not supported by either argument or authority. These questions are simply inquiries to this Honorable Court. In Question 11 appellant contends that the Court erred in not charging the Jury that appellant had no right to introduce the signed statements of the witnesses. In Question 4 appellant contended the Court erred in not allowing appellant to introduce an excerpt from one of the statements.

In Appellant's Question 7 we continue to observe the customary disregard that appellant has for the evidence in stating his question. Appellant contends the Trial Court only referred to part of the statement of William

Harris in an unfavorable, unjustified manner. Let's see what the Court actually did. Let's look at the facts.

The Trial Judge read all of the testimony of William Harris (213a). Appellant made no request that the reporter read any additional testimony to the Jury.

Appellant argued to the Jury:

(73b) "Now, as far as Jackson is concerned, we had him on the stand. I leave it to you whether we should have brought in Maiden, Hurt and Early. Are these people who have been convicted going to take the stand and admit the commission of crime? What chance would we have? Isn't that ridiculous? If they felt they would deny it, they had the same opportunity, they could have called them."

The Court charged:

(216a) "While James Jackson and William Harris were prosecuted, the evidence is silent about Helen Hurt, Willie Early and Robert Maiden, except what William Harris says about them."

Appellant had just told the Jury that Maiden, Hurt and Early had been convicted, but appellant objects to the Trial Court correcting the record.

Appellant next objects to the use of the word "involved" but he did not object at the time, nor was any request made to modify this alleged improper part of the charge. *Jack* v. *Craighead Rice Mill Co.*, 167 F. (2d) 96; *Trobridge* v. *Abrasive Co.*, 190 F. (2d) 825; *Rule 51, 28 U.S.C.A. Rules of Federal Procedure.*

Appellant is critical of the charge of the Court on burden of proof and quotes a part of the charge, then charges that these five lines were unfair to appellant. Let's look at the facts.

Appellant quotes the following five lines at page 70-71 of his brief:

(216a) "The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection you have a right to consider the testimony that the plaintiff destroyed employment records in 1953 while this suit was pending."

There was no objection to this portion of the charge, as required by the *Federal Rules of Civil Procedure, Rule 51, 28 U.S.C.A.*

Actually, the Court said:

(215a) "There is evidence that Helen Hurt, Robert Maiden and James Jackson were employed by the plaintiff before 1948. Plaintiff has employment records to this effect. Plaintiff has an employment card to the effect that Willie Early was employed July 3, 1950. William Harris according to the record evidence, was employed regularly July 26, 1950, and there (216a) is a card showing that he worked three days beginning April 26, 1950. Mr. Harris you will recall said he worked off and on before his regular employment. Mr. McConkey said he was there. That is, Harris was there when he came to plaintiff's place in September, 1949.

The burden is on the plaintiff to prove the time of employment by a preponderance of the evidence. In this connection, you have a right to consider the testimony that the plaintiff destroyed employment records in 1953 while this suit was pending.

If the plaintiff failed to prove a preponderance of the evidence, the employment of William Harris, other than what is shown by the records, then this case must fail to that extent. * * * Obviously, if he wasn't working he couldn't steal anything and would not know what anyone else did."

Again, appellant has taken a few lines out of context as a basis to charge unfairness on the part of the Trial Court. Appellant, on the basis of these few lines, charges that the Trial Court unfairly emphasized parts of the testi-

mony but the cases cited do not support appellant's contention that the Trial Judge was biased and unfair, a charge wholly unjustified. The cases cited are so different on their facts that they are not relevant authorities in the situation presented by this record.

Counsel quotes at length, but never reaches the language of the trial Judge in the cases cited.

It has repeatedly been held that it is not reversible error for a Federal Judge to comment upon, and express his opinion upon, testimony so long as the weight and effect of the testimony is left to the Jury.

Counsel charges that the Trial Judge commented unfairly on the evidence, but fails to advise this Court that the lower Court charged the Jury:

> (222a) "You should not be swayed or influenced by any feeling of sympathy or prejudice. It is your duty to carefully reflect upon all of the evidence before you and make your finding in accordance.
> "Let your only effort be to arrive at a just and fair verdict between the parties.
> "If you consider anything that the Court says in this charge as an expression of opinion on any disputed question of facts, you may disregard it, because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses. It is peculiarly in the province of the jury to judge of the credibility of the witnesses. That is to say, the extent to which they should be believed and the importance and weight to be given to their testimony. You may believe all of any witness' testimony, or you may disbelieve all of it; or you may believe it in part and disbelieve it in part."

There is just nothing to counsel's attempt to besmirch the Trial Court who, this record will show, was most considerate of appellant's counsel's tactics during the course of trial.

CONCLUSION

We submit that the Trial Court was justified in withdrawing the inventory shortage from the Jury; that when counsel by agreement withdraw exhibits without submitting those withdrawn to the Trial Court, the Trial Court is blameless; that the special verdict was correct and as no additions or modifications were requested to be submitted, counsel's complaint is without foundation; that there was no misconduct on the part of the Trial Court in its charge to the Jury and the rulings of the Trial Court and the verdict of the Jury are in all respects correct and the judgment of the Trial Court should be affirmed.

Respectfully submitted,

WILLIAM G. PICKREL
WILLIAM H. SELVA
Attorneys for Appellee.

In the

UNITED STATES DISTRICT COURT

For The Southern District of Ohio
Western Division

Civil Case No. 1622

THE SUCHER PACKING CO.,
Plaintiff,

vs.

MANUFACTURERS CASUALTY INSURANCE CO.,
Defendant.

PROCEEDINGS

* * *

Mr. Goldman

(Tr. 5) For example, the main part of the claim involves fresh and smoked pork — beef and veal has been eliminated — and sausage is only a very small part of the claim.

* * *

Opening Statement of Mr. Goldman

* * *

(Tr. 12) The evidence will show that at the Sucher Packing Company, beginning November 1, 1947, — I am mistaken about the date. I said before that the policy on which this suit is based begins November 1, 1947. However, the evidence which we will present to you, the figures will begin not on November 1, 1947, but begin in November of 1948 and extend until September of 1950.

The evidence will also show that the reason that no figures are produced for the period November 1, 1947 to

(Tr. 13) November 1, 1948 is because the Sucher Packing Company's bookkeeping at that time was not such that we could prove positively the accuracy of the figures and we believe you will be persuaded in this case, and convinced that we have restricted ourselves in this case solely to that much of the theft, although we contend, as the evidence will show, that much more theft occurred. We are restricting ourselves in our claims here only to that portion of the theft which we can prove to your satisfaction and we believe positively and conclusively, and for that reason, although the policy began in November 1, 1947, we will not show you any figures because we don't think our figures are reliable until November 1948.

* * *

(Tr. 15) If any portion went to the so-called tankage or for lard, whatever purpose it was, it was weighed so they had the exact scale weight on the dressed hog and from that you should be able to compute how much is left. If you have the whole, the evidence will show, you will be convinced, what is left should be after you subtract the parts from the whole.

* * *

(Tr. 16) And in this case, the evidence will show that after subtracting all of the properly subtractable parts, that is, the portion went into smoked pork, smoked sausage, lard and tankage and the sales weight, and what was left — and proper percentage for evaporation, there still was a very large discrepancy, the only explanation for which was that someone got away with it dishonestly.

* * *

William Harris Cross-Examination

• • •

(Tr. 38) Q. And you told the truth on the day you were caught, didn't you?

A. Nothing but the truth.

Q. Nothing but the truth?

A. That's right.

Q. And you talked to Mr. Merica on the day you were caught?

A. That's right.

• • •

(Tr. 39) Q. Do you recall Mr. Merica taking a statement from you?

A. Do I remember?

Q. Yes.

A. Yes, I remember.

Q. And you signed that, did you not?

A. That's right.

• • •

(Tr. 40) Q. Now, Mr. Merica was the person employed by Suchers to question you, wasn't he?

A. That's right.

Q. And you knew he was questioning you about alleged thefts of meat?

A. That's right.

• • •

(Tr. 42) Q. Do you recall this question: "Q. Will you state in your own words just how you came to strat taking hams from Sucher Packing Company?" Do you remember that question?

A. I remember that too.

Q. Was this your answer: "A. Well, one evening (Tr. 43) about three weeks ago Jimmy Jackson he came and stopped me and said: 'I got some hams for you to take

away from me. If you keep quiet, I'll give you $1.50 for each one of them and 75 cents for each bacon.' And so him and this Loy Maiden or Steiner they got together and he told me to take four hams, a slab of bacon and a round of beef to Gordon's home. Gordon is a bartender for Classic Gardens. I didn't get nothing out of it." Is that statement true?

A. That is when I started on the truck.

Q. Was that statement true?

A. That was true.

• • •

(Tr. 45) Q. You didn't tell Mr. Merica a thing about anyone else being involved, excepting in receiving hams and bacon, did you, in that statement?

A. I didn't tell him that.

• • •

Kenneth Smith Direct

• • •

(Tr. 109) So other than our fiscal closing inventory, when we have the auditors come in, the inventories are to a large extent approximated.

• • •

Kenneth Smith Cross-Examination

• • •

(Tr. 135) Q. You sold some hogs as carcasses?

A. In carcass form.

Q. Have you got any record on that?

A. Yes, there will be an inventory record.

Q. What do your records show that as? You don't show it as smoked pork?

A. No. That shows as fresh pork. We look at the whole department as fresh pork.

Q. That is, carcasses were sold as fresh pork?

A. Yes.

(Tr. 136) Q. That's right. Now, would you please, at your convenience today or tomorrow, see what you can find in the way of records of how much fresh pork you sold in carcass form?

A. Yes.

* * * *

(Tr. 137) Q. When you sold fresh pork by carcass, that weighed a good many pounds, didn't it?

A. Yes. Very often sell in carloads lots and very often as individual.

* * *

(Tr. 138) Q. Will you look at these weekly sheets and see if you can find where any carcass was sold?

A. No. On those sheets they show as fresh pork sales.

* * *

(Tr. 156) Q. I am talking about what we trimmed off now. That goes to lard, sausage and where else?

A. Well, the parts we trimmed off go to lard and sausage.

* * *

(Tr. 165) A. I don't think you heard me. That 17,000,000 pounds includes a great number of dressed hogs that were sold in the carcass form. Therefore, the fresh pork sold would not be 31 percent of that weight.

Q. And you have supporting data for that?

A. Yes. Before you asked if we would get a record of the dressed hogs, and I communicated with the office and they are trying to locate those records.

Q. For both periods, first and second?

A. Yes.

• • •

(Tr. 169) Q. All right. 38 percent goes into smoke. Now, 38 percent of this some 17,000,000 is quite a different figure from what is represented in your claim.

A. Here we get back again. I said included in that 17,000,000 were a number of carloads of dressed hogs that were shipped, which would not be further processed. Hogs which would not be cut up, so you can't take those percentages of that figure.

Q. And you are going to give us what that was?

A. That is correct.

• • •

(Tr. 175) Q. You stated that you had taken certain tests to try to calculate shrink; is that right?

A. That is correct.

Q. Keep any record of them?

A. No, we don't ordinarily.

Q. Did you keep any record?

(Tr. 176) A. No. I kept them for a time, then I threw them away.

Q. So you have no record at all that shows?

A. No.

• • •

(Tr. 178) Q. You do understand what is meant by "cooler shrinkage", don't you? There could be no doubt about that in the minds of the experts?

A. Yes, I understand what cooler shrinkage means.

• • •

Q. It is the shrinkage that takes place in the cooler?

A. Yes.

• • •

(Tr. 187) Q. I am talking about actual count.

A. The actual count will be on the fiscal inventory, the year end closing.

* * *

A. Our weekly inventory is approximate weights, with the exception of those at the fiscal closing, which are actual weights.

Q. That is once a year they are actually weighed?

(Tr. 188) A. Yes.

Q. Weekly they are approximated?

A. For the big part, yes.

* * *

(Tr. 194) Q. That is an approximate inventory. That is not an actual inventory by count, is it?

A. No. That is an approximate inventory in a large part.

Q. I beg your pardon.

A. It is an approximate inventory in large part.

* * *

Q. So that each one of these weekly sheets, yellow two-page, only one page to be considered, Plaintiff's Exhibit 4, all the inventory figures are approximate figures?

A. On the weekly sheets, with the exception of those sheets at the fiscal closing when all products are actually weighed.

* * *

(Tr. 195) Q. When do you take that inventory, October 31st?

A. Approximately.

Q. So the one for October 31st would be actual?

A. That is right.

* * *

(Tr. 197) Q. And that shortage is based upon an approximate inventory at the beginning of the week and an approximate inventory at the end of the week?

A. Yes.

Q. Now, who was it guessed that inventory at the beginning and the end of the week?

MR. GOLDMAN: Your Honor, the witness did not say they guessed it. He said it was approximated.

Q. Who was it named that figure, approximate beginning of the week and approximate at the end of the week?

A. We have several different foremen and clerks.

• • •

(Tr. 198) Q. Now, you probably know, Mr. Smith, that your claim begins on December 4, 1948. You know that?

A. Yes.

• • •

(Tr. 199) Q. All right. It begins the week ending December 4th. And the first period ends October 22, 1949. You know that?

A. October 22, 1949, yes, I guess so.

Q. So that in that period from December 4, 1948 to October 22, 1949, you never had an actual inventory by count, did you?

A. No. Those two periods not being fiscal closing would not be accurate, but you would only be concerned with two inventories there because the first inventory and the last, all the other intervening inventories cancel themselves out, and any percentage of error that might be in the first inventory or the last inventory would not amount to anything.

• • •

(Tr. 200) Q. All right. Now, the second period starts after your October inventory, that is, it starts November 5, 1949 and ends September 30, 1950. So in that period you had no actual inventory by count, did you?

A. The two inventories involved were approximate inventories.

• • •

(Tr. 219) Q. You were to bring us, I think, some records you have about some carcasses that were sold in the second period.

A. Yes. They are in the process of preparation now. I believe they should, perhaps, be completed around noontime, and they will be sent down here.

• • •

(Tr. 220) Q. In this complaint, the original complaint, the amended complaint and the second amended complaint, the Sucher Packing Company says that for three years they have certain losses, beginning in November, 1947 and three years after November, 1947 would be November, 1950. Do you have any records at all with you or anyplace else, that shows anything about any losses beginning November, 1947 up to these papers that you have prepared and brought in here, which begin in December of 1948, 13 months afterwards?

A. No. There are no records available for that period that would disclose the thefts. And the reason for that will be they were not started to be compiled until sometime thereafter. Weekly product analysis statement was not installed until a much later date.

Q. So, for the first 13 months of this period for which we are sued, you have no records to show to us, (Tr. 221) as you have for the last two years?

A. That's right.

Q. Is that right?

A. That's right.

* * *

(Tr. 222) Q. You don't know how much your losses amounted to in the first 12 or 13 months?

A. When you say "how much losses", yes, the monthly statement will show how much the losses amounted to, but where those losses occurred they do not show.

Q. So we begin with papers beginning about December 2, 1948 after a third of the period had passed?

A. Yes, sir.

* * *

(Tr. 227) MR. GOLDMAN: Your Honor, I think for the purpose of the record we ought to offer all these papers in so they can be more freely referred to.

MR. PICKREL: Now, if it please the Court, I don't want to seem to be too meticulous or cranky, but honestly to bring in a flock of papers like that and offer them in the record, how in the world are we going to keep track of them? We have Plaintiff's Exhibit something or other. It is a lot of white sheets. How many I don't know. I can guess. I can approximate, but I don't know. The record doesn't show. We have two folders of yellow sheets known as "Weekly Sheets", for I don't know how many weeks. We can guess how many. But our record, if they are going to introduce all these papers, (Tr. 228) then — in evidence, Plaintiff's Exhibit 3, they are just a folder with a lot of papers. If you are going to build a record in this case, we are worse off than Sucher Packing Company.

* * *

(Tr. 229) MR. PICKREL: I object to them being introduced in bulk that way. I would like to suggest this, too, about some papers that have already been introduced

There have been introduced here Exhibits 2 and 4 for respective weeks, not for the weeks covered in the petition, but for other weeks that they have selected, and each week contains two long sheets. One of them has to do with beef and veal which they say is out of the case. Well, if that is out of the case, then I think that sheet should be taken from that exhibit and leave simply the pork which is in the case.

(Tr. 256) Q. Now, I hand you weekly sheet for week ending June 11, 1949, and there we find a shrinkage of 16,551 pounds, and ask you, is that shrinkage for that week ending that date?

A. Yes, sir.

Q. And you can't explain how that shrinkage occurred?

A. I cannot explain how that shrinkage occurred.

Q. Do you know of anyone that week that stole 16,000 pounds of whatever that product was?

A. No.

Q. What was the product?

A. The product was fresh pork.

Q. Fresh pork again. Now, that 26,000 about which you testified a moment ago, and this 16,000 were both marked as shrinkage, weren't they?

(Tr. 257) A. Yes, sir.

Q. And they were both put in your auditor's report and charged to the defendant, weren't they?

A. Yes. But if there were inventory errors, we credited that; they forget to show something, it would offset itself and you would get some of that weight back in subsequent reports.

Q. That's all right, except for the two "ifs" you put in there; if there was an error and if they caught it.

A. That has been the case.

Q. Pardon me. I don't mean to argue with you.

A. Some weeks show a gain.

Q. Will you look at the week ending July 23, 1949, which we take from Plaintiff's Exhibit 2, and you find a shrinkage of fresh pork there of how much?

A. 25,692 pounds.

Q. And that is for that week, isn't it?

A. This is the week the records show that shrinkage, yes.

Q. And you don't know of anybody that stole it, do you?

A. No.

Q. You have no explanation now as to how it occurred, have you?

(Tr. 258) A. No. I can't say how it occurred. Possibly at the time—

* * *

(Tr. 259) Q. But this 25,692 pounds that is shown as shrinkage for that week, was picked up by your auditor and put in his report and charged against the defendant, wasn't it?

A. If you want to state it that way, the answer would have to be yes, qualified.

Q. All right, qualify.

A. There would also be weeks in which gains were shown and in which the defendant, as you call it, was credited.

Q. That's right. We will get to those in a minute. In other words, if you made a mistake which caused a shortage, you also made mistakes which caused overages, didn't you?

A. Yes.

* * *

(Tr. 262) Q. Now, of course, you say that those things all straighten themselves out?

A. I said if they were caused by errors they straighten themselves out. If the stuff is getting away, you never get it back.

Q. Now, you have just referred to October 1, 1948, week ending that date?

A. Yes.

Q. Which showed a shortage in fresh pork of 18,245 pounds?

A. Yes.

Q. Now, I show you the inventory for the week ending October 8th, the next week.

A. Yes.

(Tr. 263) Q. And look how it is all straightened out because it has a shortage of only 14,313 pounds of fresh pork the second week. Didn't straighten out, did it?

A. No. No doubt caused a lot of concern. That might be one of the times when we called a detective or something.

MR. PICKREL: No. You should have called a bookkeeper, not a detective. Now, as I understand, for the sake of the record, Mr. Goldman, your second period now ends – you have amended it and changed it and the changed end is what?

* * *

(Tr. 269) Q. You wouldn't sell lard as fresh pork, would you?

A. We treat it as one department, fresh pork department, just how that was broken up right now I can't answer, but I can answer with a certainty anything that was charged, the credit was given, if it was taken to another department, and the final difference of shrinkage is only what we are unable to account for.

Q. Do you know of anything else that might have been sold out of this 9,000,000?

A. Offhand, I don't.

Q. Let's look at the second period there. We find there is 17,000,000 pounds of fresh pork and we find (Tr. 270) likewise that out of that 17,000,000 pounds, you sold 10,000,000 pounds of fresh pork and you sold 2,700,000 pounds, we will call it, of smoked pork.

A. Yes.

Q. And you sold 2,100,000 pounds of sausage, which makes a grand total of sales of about 15,000,000 pounds. Now, do you know of anything else sold out of that 17,000,000 pounds of fresh pork in the second period other than those three items I have just read to you?

A. I have not examined the papers that go to make up this. I didn't make up the claim and what just every transaction is there. I don't think I can explain, but given time, I can find out the answer to all your questions.

Q. Just give me an answer to one question.

A. Not having prepared this, it is impossible for me to say with certainty what is included and what is not included.

Q. I will ask the question again. Do you know of anything else that was sold by the Sucher Packing Company during the period November 5, 1949 to September 30, 1950 — do you know of anything else that was sold by the Sucher Packing Company out of this 17,000,000 pounds of pork other than the three items that I have read to you?

A. Yes.

Q. What?

(Tr. 271) A. I know there was tankage sold. I know there was grease sold.

Q. How much, do you know?

A. Not without going through the records, no, I don't.

Q. You can find out for us?

A. Yes, yes.

• • •

Kenneth Smith Redirect

• • •

(Tr. 278) Q. Mr. Smith, I have in my hand a copy — another photostat of the same paper I believe Mr. Pickrel had, which he referred to as the auditor's statement, or compilation. I will ask you in connection with the carcass weight processed pounds figure shown of 9,758,144, in 47 weeks ending October 22, 1949, how was that number of pounds of fresh pork disposed of? Describe in your own words.

A. Well, they would be disposed of partially through the sale of dressed hogs part through the sale of fresh hams, loins and various fresh cuts obtained after the animal is slaughtered, and partly through the sale of lard and partly through the sale — transfers to other departments.

• • •

Julian A. Hawk — Voir Dire

• • •

(Tr. 291) Q. Do you know whether or not Mr. Hadler made an audit of the company's records and data to support the figures given to him by the company?

A. I know that he did not.

• • •

(Tr. 292) Q. Do you know whether Mr. Hadler secured the data that he obtained on his work sheets simply by copying from these sheets?

A. That is my understanding, the way it was done.

• • •

Julian A. Hawk Cross-Examination

* * *

(Tr. 306) Q. Now, I am asking you if there is fed into the week's inventory figures that are incorrect so that it throws an incorrect position at the end of the period, which incorrect position is picked up for the start of the next period, and then the next period again incorrect information is fed in which affects the inventory at the end of that period, the fact that incorrect information is fed into (Tr. 307) these inventories week by week, certainly has something to do with their true value as inventories; is that not so?

A. Well, certainly, the items which would come in have to be correct.

* * *

Kenneth E. Smith Re-Cross

* * *

(Tr. 319) Q. Now, did you bring in the sheets, your work sheets, your weekly sheets for the last three weeks in September, 1950 that I requested the other day?

A. No, I didn't bring those in. I believe they are still looking for those. We have been digging records around so much that—

* * *

(Tr. 320) Q. Now, I am asking you if you know that according to Mr. Hadler's sheets and to his calculations that for the week ending September 16, 1950, you were short 11,096 pounds of fresh pork?

A. No, I don't know that. In fact, I have not looked at Mr. Hadler's work sheets.

* * *

(Tr. 323) Q. Now, look on those sheets and any more that you want to look on here — I don't mean to deprive you of the opportunity of searching more of them. I think these are probably indicative. Tell us whether or not there is in any place in those sheets that there is any figures at all about the amount of meat that went into the cafeteria out at the plant?

A. On these sheets there are no figures on the amount of meat that went into the cafeteria.

* * *

(Tr. 326) Q. So that this sheet that you have in front of you dated November 5, 1949—

A. Yes.

Q. (continued) — was the sheet made up immediately following your actual inventory by count?

A. Yes, that is correct. And inasmuch as there was no live hogs charged on the opening inventory here, would indicate that the error happening there — in other words, nothing was charged to that to begin with. Something perhaps occurred that week or something unaccounted for.

Q. So that 492 pounds over on the right hand side, for the November 5, 1949 statement, is that in error, do I understand you to say?

A. Yes, I would say there was an error.

Q. That was an error?

A. Yes.

Q. Well, take a little further look at that sheet and see if there are any more errors you can tell us (Tr. 327) about.

A. There would be none I would be able to tell you about that I see here.

Q. Well, you notice the next name there under "live hogs" is the word "offal".

A. Yes, sir.

Q. And then over to the right hand column you have "shrinkage or gain". The amount of offal in pounds is circled.

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. So there was a shortage in this offal?

A. That is what the records show, yes.

Q. How much of a shortage?

A. 5544 pounds.

Q. Well now, you don't claim, do you, Mr. Smith, as vice president of this company that somebody stole 5000 pounds of offal?

* * *

(Tr. 336) Q. Now, I will show you a product analysis sheet dated October 22, 1949, taken from Plaintiff's Exhibit 2, and refer you particularly to a heading on the left hand side known as "sausage raw meat". Is that a familiar name to you?

A. Yes.

Q. And we will follow across here and we find that in the shrink or gain column over on the right hand side there was missing 1811 pounds of that raw sausage meat, is that correct?

(Tr. 337) A. It shows a shrink of 1811 pounds, yes.

Q. That means it was missing, it was not there; is that right?

A. It shows a shrink of 1800 pounds, yes.

Q. But to get down to plain words, it means that – we folks that don't understand about this accounting – means it was 1811 pounds that was not accounted for, it was missing?

A. Yes, it shows that.

Q. Is that what it means?

A. It shows a shortage there, yes.

Q. Now, you are not going to tell this jury, are you, that anybody out at that plant, one of the employees, stole 1811 pounds of raw sausage meat that week?

A. No, I wouldn't think that they would, but for the same reasons as we have gone over before, you can't pick out a certain week and say that the shortage occurred in that week. But when you take an accumulation of weeks, you come to—

Q. But that week does show there was 1811 pounds of raw sausage meat short, missing; is that right?

A. That is what it shows that week.

Q. And it is circled?

A. Yes.

• • •

Abe Solomon Cross-Examination

• • •

(Tr. 360) Q. All right. Eliminate the word "again", so your reduction, which represents the amount of meat during the period of the claim, pork products which were given to the employees of the Sucher Packing Company without charge, represents an estimate?

A. The figures used in the claim reduction represents an estimate, yes.

• • •

(Tr. 363) Q. And can you tell me, when William Harris began to work for the Sucher Packing Company?

A. In accordance with the employment record, which we had and which we were able to find, he began work on July 20th — some day in July, 1950.

• • •

Q. I hand you what has been marked as Defendant's Exhibit M for identification and ask you to examine that, please, and tell me what it is.

A. This was an employee record card prepared on William Harris when he came to work on July 28, 1950, for the purpose of putting him on the payroll, setting the rate by which he would subsequently be paid. It also shows (Tr. 364) the date he left and the reason that he left.

• • •

(Tr. 370) Q. So, is it not a fact, Mr. Solomon, as Treasurer of the company, that the figures appearing on Plaintiff's Exhibit 6 for identification is the total adding machine tapes appearing on Mr. Hadler's work sheets?

A. It is the same figure.

Q. Why, sure. Now, when did you advise Mr. Hadler that there was any kind of a shrink?

A. I imagine that was shortly after September 11th of 1950 that we engaged Arnold, Hawk & Cuthbertson, through Mr. Hawk, to determine whether or not the books and records reflected any shrink.

• • •

(Tr. 379) Q. Now, from the killing room the hogs are taken to the chilling room?

A. That's right.

Q. Anything done to them in the chilling room?

A. Not unless it would store.

Q. Then they remain in the chilling room for a period of time and is that chilling room also known as the cooler room?

A. It is known as the hog cooler.

Q. And on this summary sheet where we have "Note 1", there appears "fresh pork carcass weight is dressed weight after deducting 3% allowance for cooler shrinkage". Is that what appears there?

A. That is right.

Q. And that shrinkage reflected in "Note 1" is the shrinkage that occurs when a hog is hanging there in the cooler, and chill room?

A. No. That is an error.

Q. This is in error?

A. That's right. The claim that 3% is cooler shrinkage, in the sense that it is the shrinkage taken in the hog cooler, is an error.

Q. That was an error?

(Tr. 380) A. That's right.

• • •

(Tr. 383) Q. What shrink, other than cooler shrink, occurs in the cooling room?

A. Well, in the cooling room you would just have what you call "cooler shrink".

• • •

Q. What is the first thing that is done to the hog in the cutting room?

A. The hog is brought into the cutting room, into the center of the room on a rail, the gambrels are removed and the hog is placed on a table.

Q. When we speak of gambrels, can you tell us what that is?

A. Yes. The hog is handled through the plant in the dressed state by placing a wooden stick in the leg or in the hind legs of the hog, between the leg and the cartilaginous tissue, which gives the piece of wood a secure hold on the hog. Then a wheel with two pieces of metal coming down to surround the piece of wood holding the hog with the hind feet up and it can be moved on the rail.

(Tr. 384) Q. And that is on that carcass at the time it reaches a hot dressed weight, that stick?

A. It is actually on the carcass from the time the hog leaves the dehairing machine.

Q. After that is taken off, what occurs to the hog?

A. Well, the hog is placed on a table and split in two.

* * *

(Tr. 386) Q. Now, when the ham is collered, can you tell me what is done with that fat?

(Tr. 387) A. The fat is put into trucks and it eventually ends up in lard, taken to the lard room, weighed, taken to the lard room and put in the lard kettles.

* * *

(Tr. 396) Q. Where does the fat go to?

A. The tank truck is right at the side of the man during the cutting and it passes out of the room when loaded, loaded on a scale and sent to the lard department.

* * *

(Tr. 398) Q. Well, now, in 1950 were there any hogs sold as dressed hogs?

A. Yes.

Q. There were?

A. Yes.

Q. I think the testimony is that those are not included in here; isn't that right?

A. They certainly are included in there.

Q. They are included?

A. Yes.

Q. Then they go in part to make up this 9,000,000 pounds?

(Tr. 399) A. Yes, sir.

* * *

(Tr. 407) Q. We didn't weigh them yet. Let's see where is that weight recorded?

A. Right off the killing floor.

Q. Now, you have this hog hung up and it goes on this runway, I understand, until it reaches the scale?

A. That's right.

Q. And is that scale located under the hog, to the side of the hog, or where?

A. It is a track scale.

Q. A track scale?

A. That's right.

(Tr. 408) Q. Now, can you tell me what a track scale is?

A. A track scale is a portion of track that is separated from the fixed part of the track so it can measure the weight of whatever is on it.

* * *

(Tr. 418) Q. I didn't ask you whether you ruled out. I asked you if it is not a fact that you still had these shortages, September 16th 11,000 pounds, September 25th 3709 pounds, September 30th 6600 pounds, after the date upon which Willie Harris was apprehended?

A. Those figures do not necessarily represent the shortages of those particular weeks.

Q. All right. They are there, aren't they, speaking of these three from Mr. Hadler's work sheet?

A. Yes.

Q. And on this work sheet you notice various weeks from November 5th all the way to September 30th of 1950, do you not?

A. That's right.

Q. I am speaking of November 5, 1949, and after each week you see an alleged shrink or an alleged gain, don't you, by week?

A. That's right.

* * *

(Tr. 421) Q. Now, Mr. Solomon, as treasurer of the company, you have a closing on October 31st of each year, don't you?

A. That's right.

Q. Was there any reason for terminating the first 47 weeks of this period on October 22, 1949 instead of October 31, 1949?

A. Yes. The reason was that we could not find the figures for that particular week, the folder, because it was the end of the year, perhaps had gotten more attention than the rest of the folders and could not be found with the rest of them.

Q. So, without that analysis sheet, you were unable to include, or at least Mr. Hadler was unable to include, any figure for the 48 weeks, so he stopped at 47 weeks; is that right?

A. I assume that is what he did. I say, again, I did not tell him how to do his job.

Q. At least you did not give him the weekly production analysis sheet of 48 weeks?

A. I didn't have it.

Q. So without that, he does not have the 48th week on his schedule?

(Tr. 422) A. Not for the first period.

THE COURT: These three weeks were taken out. Do I understand that they were taken out on a basis of an average over a whole period of time?

THE WITNESS: The average of the 48 weeks in the second year of this claim.

THE COURT: Not taken out, the actual amount that had been put in for those three weeks?

THE WITNESS: No.

Q. Now, do you have the weekly production analysis sheet for the week ending September 16, 1950, which is the first week following Mr. William Harris'—

A. I have been asked to look for it and have not been able to find it.

Q. Now, when did you present this computation to the defendant?

A. This computation?

Q. Yes, sir. Wasn't it sometime in early 1951, to help your memory?

A. It probably was.

• • •

(Tr. 433) Q. And on those tapes appear the figures in the weekly analysis production sheets, don't they?

A. That's right.

Q. For each of 47 weeks?

A. That's right.

Q. But not for the 18th week, or the week ending October 31, 1949, do they?

MR. GOLDMAN: There wasn't a week ending October 31st. I assume you mean 29th.

MR. SELVA: Whatever that last week was is the one we want to see. So far, we have not been able to see it. All right.

Q. It does not, with that correction, include the week ending October 29, 1949, does it?

A. No.

• • •

(Tr. 436) Q. Now, I hand you again, Mr. Solomon, what has been identified as Defendant's Exhibit N for identification, and ask you to compare Defendant's Exhibit N for identification with Plaintiff's Exhibit 6 for identification, and tell me whether or not the carcass weight processed, pounds on Plaintiff's Exhibit 6 for identification opposite No. 1, is the same as the figure under fresh pork carcass weight on the adding machine tape?

A. Yes, it is.

Q. And what is that figure?

A. 9,758,144 pounds.

Q. And does that summary contain the data of October 29, 1949?

A. No, it does not.

* * *

(Tr. 440) Q. Now, Mr. Solomon, I just want no explanation to begin with, please. Can you tell me the number of pounds of meat that was given to the cafeteria by the Sucher Packing Company for its employees during the second period which runs from November 5th to September 9th of — at this time?

(Tr. 441) A. I can't, but only because I couldn't find the record.

Q. Another record you couldn't find; is that it?

A. Yes sir.

* * *

(Tr. 442) Q. And will you glance at this work sheets just to be sure, please, and tell me whether or not any of those work sheets include the fiscal week of October 31st, or the nearest week to that week when the books are closed? Just hurriedly look through them if you will, or take your time, it doesn't make any difference.

A. No, they do not.

Q. None of them do?

A. No.

* * *

(Tr. 444) Q. You mean even on these sheets there are errors?

A. Pencil and erasures — people write things down, an erase it.

Q. That is true. Almost anytime you compile figures and computations, you are likely to make mistakes.

A. In this particular case, it is obvious somebody made a mistake.

(Tr. 448) Q. Now, Mr. Solomon, I hand you what is marked as a production analysis sheet for the week ending January 8, 1949, and I want you to do some figuring for me, please, to determine how you arrived at the excess for that particular week. Now, you start your week with what figure?

A. Which item are you referring to?

Q. Speaking now of fresh pork. I think that is the one in which most of these discussions have been going, total fresh pork.

A. All right.

Q. You have an opening figure of what?

A. 70,898 pounds.

(Tr. 449) Q. Now, during that period, did you buy any fresh pork?

A. Yes, we bought 3351 pounds.

Q. And that gave you a total of what? It would be 74,249, is that right?

A. That's right.

Q. Now, you had a transfer in, did you not, during that period?

A. Yes.

Q. How much did that amount to, please?

A. 172,584.

Q. 172,584, is that right, sir?

A. That's right.

Q. That is the total fresh pork which we started with, which we purchased and which we added as a transfer in, if my figures are correct, of 246,833. Would you say that is correct?

A. Yes.

Q. Now, what was done with that? Some of it was sold; is that right?

A. Right.

Q. How much was sold from that sheet?

A. 52,363.

Q. And that would leave us with 194,407; is that right?

(Tr. 450) A. Right.

Q. Now, do you have any transfers-out to other departments?

A. On this sheet, there is 115,314.

Q. Now that gives us a balance of what on your sheet?

A. Well, write it down.

Q. What is the balance on your sheet now, that you have on hand?

A. The balance is 81,853.

Q. Actually, the balance would be 79,156, wouldn't it? You figure it.

A. All right. That's right. And then subtract that from 81,553 and we have a gain of 2694.

• • •

(Tr. 475) Q. All right. While you would charge it out, transfer it out at 8 to 10 pounds, when you take the inventory then it weighs 7 and ½ pounds average, doesn't it?

A. That's right.

Q. Now take the 10 to 12 pound skinned bacon. You have 318 with a weight of 302 pounds, and that averages less than 10 pounds a slab, doesn't it?

A. That's right.

Q. Although it is entered in as 10 to 12 pounds; is that right?

A. The belly maintains the same identification it had originally.

Q. It is charged out at 10 to 12 and ends up as a 10-pound bacon, doesn't it?

(Tr. 476) A. Slightly less.

Q. Slightly less than 10 pounds. That is the lowest weight. Now, the third category is 14 to 16 pounds group, is it not?

A. That's right.

Q. And you had 179 skinned bacons there with a weight of 2306 pounds; is that not right, sir, on that sheet?

A. That is right.

Q. And that averages a little over 12 pounds to a slab, doesn't it?

A. Yes, sir.

Q. And then in the last category, you have 16 to 18 pound average skinned bacons, 111 weighing 1707 pounds, and that averages out to a little over 15 pounds to a bacon, doesn't it?

A. Yes, sir.

Q. Although it was entered in as a 16 to 18 pound bacon, was it not?

A. It carries the title of 16 to 18 pound belly, yes.

• • •

(Tr. 481) Q. Now, Mr. Vass apparently again took an inventory of the skinned bacon, did he not?

A. That's right.

Q. And in that inventory he has 8 to 10 pound averages, 10 to 12, 14 to 16 and 16 to 18, does he not?

A. That's right.

Q. And in the first category, the slab of bacon would end with an average of 8 pounds; didn't it?

A. That's right.

Q. And in the second category, ended with an average of 11 pounds exactly, between 10 and 12, wouldn't it?

A. It is 11 pounds; yes.

Q. And in the third category, 14 to 16 pounds would end at 14 pounds even, would it not?

A. Looks like it; yes, sir.

(Tr. 482) Q. And in the 16 to 18 pound category would end at 16 pounds even, would it not?

A. That's right.

* * *

(Tr. 491) Q. Did you ever receive a report prior to the 11th day of September, 1950 of anyone being apprehended removing particles of meat, in whole or in part, from the Sucher Packing Company?

A. I don't recall any specific instance at this time.

Q. And you, of course, went through the plant frequently after you were there, didn't you?

A. Yes, sir.

Q. And did you at any time, see anyone removing any meat from any department which they were not supposed to handle?

A. No.

* * *

(Tr. 499) Q. So they took the shrink pounds and they deducted the gain pounds and that is the figure that they submitted, is it not?

A. I think so. I take your word for it. I don't know.

Q. Now, the first week following September 11th you show a shrink of 11,096 pounds. That is September 16th.

A. Yes, sir.

Q. And the next week, September 25th, following September 11th, you show a shrink of 3707 pounds, don't you?

A. That's right.

Q. And on September 30th following September 11th you show a shrink of 6666.

A. That's right.

Q. And I would like to ask you, Mr. Solomon, if you still prepare weekly production analysis sheets?

A. Yes, sir.

Abe Solomon – Cross

Q Can you tell me in those analysis sheets, let's say of October, 1950, did you continue to maintain a column for shrink loss and shrink gain?

(Tr. 500) A. Well, I don't think we have changed our methods.

Q And even today, you still maintain a column shrink loss and shrink gain, don't you?

A That's right.

MR. SELVA: I think that is all. Thank-you.

Abe Solomon Redirect

* * *

(Tr. 502) Q I hand you what has been marked as Plaintiff's Exhibit No. 7, and ask you if that is a time card of William Harris for the particular dates that show as a day laborer?

MR. SELVA: If the Court please, we object.

THE COURT: What is the objection?

MR. SELVA: We have made demand upon the plaintiff for the records and have been given certain records, we object if they have withheld anything until this time.

MR. GOLDMAN: Where is your demand that requested that record?

MR. SELVA: Right here in your presence.

MR. GOLDMAN: That wasn't a formal demand.

MR. SELVA: If the Court please, I did not demand each record specifically. I don't know what records these people have or may, and I demand the records of this employee.

THE COURT: Let's see that.

(The witness handed Exhibit 7 to the Court.)

(Tr. 503) MR. GOLDMAN: I may say, your Honor, that that record was found over the weekend, after diligent

search, and Mr. Selva had never requested, as I recall about any formal processes. He made an oral request to me in an informal meeting that we had.

THE COURT: You submitted to him the other employment card at his request.

MR. GOLDMAN: That is what we found at the time. That is where he got it.

THE COURT: Then his request would have been broad enough to have included—

MR. GOLDMAN: Had we known that this existed we would have given it to him. Because of Harris' testimony that he had worked earlier than this other card, we tried to find if there were any records of his employment. Most of them had been thrown out, but this one was located.

* * *

Abe Solomon Re-Cross

* * *

(Tr. 533) Q. Commencing on page 87, speaking of William Harris, I asked you this question: "Will you get his employment record for us at this time, please?" Whereupon Mr. Solomon left the room and thereafter returned bringing with him two cards." Mr. Goldman was present at that interrogation, was he not?

A. I think so, yes, he no doubt was.

Q. "This is the entire record of the employer named on the record?" Answer: "As far as I know." Were those questions asked of you and those answers given?

A. Yes.

* * *

(Tr. 536) Q. "When did William Harris commence working for the Sucher Packing Company?" Answer: "July 26, 1950." Question: "And in what capacity was he em-

ployed? Answer: As a laborer. Were those questions asked you and those answers given?

A. Yes.

Q. Now, you know this action was filed in 1952, don't you?

A. I believe so.

Q. And in 1953 you say you threw away many of the records for employees whom you accused of having committed acts prejudicial to your company?

A. Oh, we threw away the time cards and threw away cancelled checks for the period.

* * *

(Tr. 537) Q. Will you tell me what amount you accuse Helen Hurt of stealing?

A. I can't break down the amount in the loss attributable to any one individual.

Q. Will you tell me what amount you accuse Robert Maiden of stealing?

A. I can repeat the same answer.

Q. You don't know, do you?

A. No, not what an individual took.

Q. Will you tell me what amount you accuse William Early of stealing?

A. I don't know.

Q. You don't know, do you?

A. I don't know.

Q. Will you tell me what amount you accuse William Harris of stealing?

A. I don't know.

Q. Have I listed all five of them?

A. I think so.

Q. Will you tell me what amount you accuse Mr. Jackson of stealing?

A. I don't know.

(Tr. 538) Q. Will you tell me what amount you accuse these employees working together, or in collusion with each other, these five employees, of stealing?

A. We know the total that was stolen.

Q. That is not my question. If you will, please, confine yourself to that question.

MR. SELVA: Read it to the witness, please.

(Thereupon the last Q. was read by the reporter.)

A. In collusion with each other only?

Q. Yes.

A. I can't answer that.

Q. Will you tell me what amount, please, you accuse unidentified employees of stealing?

A. Not by themselves, I can't answer that.

Q. As a matter of fact, this entire loss set forth in your proof of loss and in the petition or complaint filed in this case by Mr. Goldman, an officer of the company, represents an inventory loss, doesn't it?

A. Due to theft.

Q. I asked you if it represents an inventory loss?

A. It represents an inventory loss due to theft.

Q. Can you tell me what part of this loss was taken in 1948?

(Tr. 539) A. I cannot.

Q. Can you tell me what part of this alleged loss was taken in 1949?

A. I cannot.

* * *

(Tr. 550) Q. Mr. Solomon, referring again to this inventory shortage of December 24, 1949 in the sum of 10,609 pounds, was that stolen?

A. We don't claim 10,609 pounds was stolen that week.

Q. Was it stolen?

A. The overall shortage in the year, in the two-year period of the claim, we claim was tolen.

Q. You mean just the lump—

A. Not 10,609 shortage the week December 24th. Could very easily be attributed – it was the day before Christmas. Somebody taking the inventory on that day would be anxious to get home. It would be corrected the following (Tr. 551) week.

Q. On that particular day, 10,609 is the result of the error on the part of the party taking it, would be because they wanted to get home?

A. Part of it would be. We couldn't judge on that itself.

Q. The week immediately following that, you say that would sort of have shown up by that week. You have a gain then of 1572 pounds?

A. That's right.

Q. Do you know anyone who brought any meat in–in that amount, in that week, to the Sucher Packing Company?

* * *

(Tr. 552) Q. Now, Mr. Solomon, did you prepare this proof of loss wwhich you signed?

A. Yes, sir.

Q. You used the language contained in that proof of loss is that right?

A. I signed it. I had to prepare it. I am no lawyer to make up—

Q. That is what I asked you, whether or not you prepared it. I want to give you the opportunity to correct yourself.

A. I stand corrected.

Q. Who did prepare it?

A. I imagine the company counsel, at that time, Jerome Goldman.

Q. That is the gentleman seated over there?

A. I don't know for certain, that is the way it was done It probably was done that way by Mr. Goldman. I don't know for certain.

Q. You did, however, read it, did you not?

A. Oh, yes, certainly, I read it.

Q. Of course, you considered it carefully before you signed it, to be sure it was correct, didn't you?

A. That's right.

Q. Let me read this to you: "That all of said employees above named whose identity is known, except Willie (Tr. 553) Early, have been continuously in the employ of said assured for a period beginning prior to November 1, 1947 and continuing to September 11, 1950." Was that statement correct in connection with William Harris, was he continuously in the employ of the Sucher Packing Company, day by day, for that period of time?

A. I can't say now that it is correct, no. At that time I felt it was correct.

Q. But you, at that time, also had in your possession his employment card, did you not?

A. Well, certainly. It is part of the record of the company.

Q. And in this proof of loss you also referred to beef, which has now been dropped and also to the last three weeks of September, which also have been cancelled out.

A. Yes.

• • •

(Tr. 555) Q. And the computation which has been marked as "Plaintiff's Exhibit 6 for identification", shows that all of (Tr. 556) the figures in the right hand column which are contained in the proof of loss are characterized as "unexplained loss", isn't that right?

A. That is the title that is given to it by the accountants

Q. That is the title that was on it when you sent it to the Manufacturers Casualty Insurance Company?

A. That's right.

Q. And that is the title that was on it when you got it from Arnold, Hawk & Cuthbertson?

A. That's right.

Q. And that is the title that you have seen on it all during these years, isn't that right?

A. That's right.

• • •

(Tr. 560) Q. Will you take this week ending January 15, 1949 and tell me how many pounds would be over from those figures?

A. I couldn't tell you.

Q. How many pounds would be under from those figures?

A. I couldn't tell you.

Q. Whatever they were up or down they would be taken from the inventory of fresh pork transferred out; wouldn't they?

A. Yes. The net deviation would go to fresh pork transferred out.

Q. And the net deviation would be an error, wouldn't it?

A. Small error.

Q. Well, whether small or large, it is an error?

A. Yes.

• • •

(Tr. 561) Q. Mr. Solomon, I want to call your attention, and it may be that I have overlooked it, to lard. Is there any item here on this analysis sheet for lard?

A. Well, lard is not included in the claim. That is not considered fresh pork.

Q. I know. But it comes out of that 9,000,000 pounds of fresh pork?

A. Yes. The pounds in these lard tanks, and I don't know whether they are included in these work sheets.

(Tr. 562) A. I don't know. I will see if I can find it. Here it is: 41,481 pounds of fresh pork transferred to lard.

Q. Where did you get that 41,000-pounds figure?

A. Here (indicating).

Q. I know it is there, but where does it come from?

A. It would come from a total of the weights going into lard, which weights are not with these papers.

* * *

Robert Hadeler Direct Examination

(Tr. 579) Q. Mr. Hadeler, you have stated in making the computation that you took the gains and shrinks as shown on the product analysis sheets, subtracted the gains from the shrink and get the net figure as the total?

A. Yes, sir.

* * *

Robert Hadeler Cross-Examination

* * *

(Tr. 583) Q. I will get to that. Just a minute. That is all we have heard in the past week. So that, that shrinkage of 4800 pounds that week, could come either from errors in transfer, taking the inventory, mistakes in other words, or it could come from additional shrink because the merchandise stayed in the storage too long, some spoiled, or it could come from theft. Those are the three sources that lead to that shrink item, aren't they?

A. That is reasonable.

Q. Well, is it correct?

A. That is correct.

* * *

(Tr. 588) Q. That's right. All right. Now, the first figure that I see on Plaintiff's Exhibit 6, this white sheet here, that we are all looking at, is 9,758,000 plus, carcass weight of fresh pork; is that right?

(Tr. 589) A. Yes, sir.

Q. Now, that means that the 3 percent cooler shrink has been removed, and this is the net weight after it has gone through the cooler?

A. Yes, sir.

* * *

Q. All right. So we are charged with 9,758,000 (Tr. 590) pounds plus. Now that figure of 9,758,000 pounds is a total that you computed from these weekly price sheets, similar to the ones you just had in your hands, is that right?

A. Yes, sir.

* * *

(Tr. 592) Q. All right. The week ending July 2, 1949 shows what you term an unexplained gain; is that correct?

A. Yes, sir.

Q. And that unexplained gain is just like the unexplained loss. It might come from any one of two sources, either error or less shrink than computed; is that correct?

A. Basically correct.

* * *

(Tr. 593) Q. Well now, this particular week that we are just discussing where the overage was some 6000 pounds, you found no indication on any books or records of the Sucher Packing Company that anybody had brought back 6000 pounds of meat, did you?

A. No, sir.

Q. So that, that unexplained gain for that period was all within the plant and its records, nothing from the outside that contributed to it?

A. So far as I know.

* * *

(Tr. 595) Q. Now, in a sentence, Mr. Hadeler, you took all the unexplained shortages for all the weeks of the first period, you totalled them. Right?

A. Yes, sir.

Q. And you took all the unexplained gains for the first period and you totalled those?

A. Yes, sir.

Q. Then you deducted from the total unexplained shortages the total unexplained gain and came up with the figure as shown on this report of 199,100 pounds?

A. Yes, sir.

Q. Is that right? So that you put the whole period all on two adding machine tapes, didn't you?

A. Yes, sir.

* * *

(Tr. 596) Q. Why, sure. So there was a shortage in the inventory, so far as their records. I am not blaming it on you. So far as their records are concerned, their inventory figures, ones they took, they did not agree with the operation figures for that week.

A. There was an unexplained loss that we could not account for on the record.

Q. And that unexplained loss was in the inventory. The inventory was that much less than the operating figures showed it should have been: isn't that right?

A. That is how it was arrived at.

* * *

(Tr. 598) Q. I don't know why, but it was 4000 pounds short, and you charged that shortage on the unexplained loss records; don't you?

A. Yes, sir.

Q. And that inventory that had that 4000 pounds short, which you added to your unexplained shortages, was used as a beginning inventory for the following week?

A. Yes, sir.

Q. And that occurred throughout both periods, didn't it?

A. Yes, sir.

(Tr. 599) Q. But just the same, you took all the shortages, added them together, took all the overages, added them together, deducted the one from the other and computed the entire period on two adding machine tapes, didn't you?

A. Yes, sir.

* * *

(Tr. 601) Q. But in preparing Plaintiff's Exhibit 6, at that time, you did not make any exact audit of those transactions?

A. That is correct.

Q. That is correct. Now, what you did at other times is very interesting, but we are most intimately concerned with these sheets that are before us now.

A. No, I didn't make an exact audit of all those sheets.

* * *

(Tr. 606) Q. Now, the question that was asked, "Have you ever determined what that shrink was from your audits?" and your answer was "No". Is that answer still correct?

A. Yes, sir.

* * *

(Tr. 611) Q. Well, I will ask you if you didn't tell Mr. Selva a year ago, when he asked you if there was any excess shrinkage before 1948, your answer was: "They were never concerned with it."?

A. Well, at least, they never asked me to make any special investigations.

* * *

(Tr. 616) A. The loss is unexplained as far as I am concerned. It might have been caused by theft if the shrinkage factors used are wrong, the figures would be wrong.

Q. Or mistakes?

A. Sir?

Q. Or mistakes?

A. Mistakes.

Q. In their bookkeeping, in their records??

A. Oh, if errors have been made.

Q. Yes, sir. When you prepared your report off of that work sheet, you would be able to give us the figures for the last three weeks in September. Would you look at your Exhibits 14-A and 14-B and see if you have them?

A. Last three weeks in September?

Q. Yes, sir.

A. They are on this sheet, yes.

Q. Will you call them off so we will have them in the record?

A. What figures do you want?

Q. What figures do you have? Do you have fresh pork?

A. Fresh pork shrinkage?

Q. What is the fresh pork shrinkage September (Tr. 617) 17th, September 23rd and September 30th?

A. I guess I have the wrong year.

Q. That is 1950.

A. The dates I show are September 16th, September 25th and September 30th.

Q. All right. What are those? That is 1950?

A. 1950.

Q. All right. Give us the fresh pork shrinkage or gain for each of those three weeks.

* * *

(Tr. 619) Q. Now, all these shortages and all these gains for that three-week period occurred after the colored boy was caught stealing some hams; didn't they?

(Tr. 620) A. I assume that is correct. I have no actual knowledge when he was apprehended.

* * *

(Tr. 621) Q. We haven't either. Now, you are still doing the auditing out there, aren't you?

A. Yes, sir.

Q. And they are still keeping the gain and loss figures, aren't they, just like they did throughout these two periods?

A. Yes, they are doing that currently.

* * *

(Tr. 622) Q. Did you ever see anything on their journal or ledger or daybook, where they made any report or any figures or any statement as to any thefts?

MR. GOLDMAN: I object, your Honor. It would be self-serving. We could not produce such record to prove there were thefts. It is immaterial.

THE COURT: Concerning this period?

MR. PICKREL: Yes.

Q. Did you ever find one?

A. No, sir.

* * *

(Tr. 625) Q. So you would not give your unqualified certificate on any inventories in any of the weekly sheets contained in those two periods?

MR. GOLDMAN. I object, as immaterial. The facts are the facts, whatever they may be.

THE COURT: You may answer the question.

A. No, I wouldn't give an unqualified, because I didn't check them, of course.

* * *

(Tr. 629) Q. I am now referring you to Plaintiff's Exhibit 14-A. If you will check that, please, and tell us if there was any one week in the 47 weeks that made up that first period, that did not have a shortage or a gain?

A. No. Every week is either a shortage or a gain.

* * *

(Tr. 637) Q. Did you comment to the officers of the Sucher Packing Company on the fact that every week there was a shortage or a gain, and why, or question as to why?

A. I did not, with respect to every week, no.

* * *

(Tr. 642) Q. Now, this is true, isn't it, that if those 1400-pound vats had a few pounds more or a few pounds less, that affects not only what goes into cure, but all of – also affects the figure on what is left in fresh pork? Isn't that right?

A. That is correct.

Q. And when it affects the fresh pork that goes into cure, then it also affects the final figure for the end of the week, whether there is a shortage or a gain?

A. Correct.

* * *

(Tr. 643) Q. So that anything that affects the correctness of calculations that have to do with shortages of meat, affect the figures as reflected in your final report, don't they?

A. Yes, sir.

* * *

Mr. Hadeler Redirect

* * *

(Tr. 647) MR. SELVA: I would like to call your attention to something else about this exhibit. I just found out you have added in all the beef and veal figures. Are you going to take them out, or leave them in?

* * *

MR. GOLDMAN: The grand total figures are wrong. I think the exhibits should be redrawn.

Arthur Beerman Direct

* * *

(Tr. 653) Q. Did you make any physical changes at the plant with respect to openings, doors, and things of that sort?

A. We put guards on the outside, a guard building. We repaired all our fences. We closed the front yard and permitted customers and employees to come and go through a guarded passage and to the best of my knowledge, everything was checked in and out.

* * *

Francis E. Merica Direct Examination

* * *

(Tr. 666) Q. What is your occupation, Mr. Merica?

A. Private investigator.

Q. What is your experience in the field of detective investigating work?

A. I started in the work 32 years ago.

* * *

(Tr. 667) Q. About when were you employed?

A. It was in the fall of 1949.

Q. What did you do on that occasion?

A. Well, we assigned men out at the Sucher Packing Company at night to watch the fence and see who was coming in and out and whether they were carrying any packages, and such as that, but we didn't find anything.

* * *

(Tr. 669) Q. After interviewing Harris, did you interview any other employees?

A. Yes, I interviewed Jackson, Maiden, Hurt.

Q. Do you recall an employee named Early?

A. That's right, at that time. I later interviewed all the employees in the entire plant.

* * *

(Tr. 671) THE COURT: I mean, did you find physically in any way, a matter of investigation, talking to someone?

THE WITNESS: I found just one piece in talking to someone.

THE COURT: You mean found one piece of meat?

THE WITNESS: Yes, sir.

* * *

Ray McConkey Direct Examination

* * *

(Tr. 677) Q. When the ham is trimmed, what is done with the trimmings from the ham?

A. The fat trimmings are throwed in a truck and are removed to the rendering, the lard rendering.

* * *

Ray McConkey Cross-Examination

* * *

(Tr. 694) Q. Do you recall this question being asked of you and this answer given by Mr. Green? "Then I take it that prior to September 11th you had no reason to believe that any quantities of meat were being taken from the plant? A. I had no knowledge of any." Do you recall that question asked of you and that answer given by you on September 26, 1950?

A. I did have no knowledge of any being taken.

Q. You had no personal knowledge, did you?

A. No, of any being taken, no.

Q. And you were over the entire plant?

A. Yes, sir.

* * *

Q. At no time did you see any employee carrying out any unauthorized meat package or meat?

A. Not actually did I see them.

* * *

(Tr. 701) Q. You didn't see that. Mr. McConkey, can you tell me whether or not, to your knowledge, any actual record was ever made as a result of any actual test on shrink at the Sucher Packing Company during the time you were there?

(Tr. 702) A. I don't remember of any.

* * *

(Tr. 710) Q. Yes, sir. But when they do touch, those (Tr. 711) parts of the various hogs that touch, don't get adequate chilling?

A. Well, I mean, it depends. Just the matter of fact they are touching doesn't mean they wouldn't be. The refrigerator, or temperature wouldn't come down if they were pushed together. That would be suicide as far as handling meat is concerned.

Q. Why would it be suicide?

A. You would have spoilage. You couldn't do that.

* * *

(Tr. 712) Q. And at least when this picture was taken, that is the way they were packed, were they not?

A. Yes.

Q. And were they ever packed that way in the period 1949 to 1950, to your knowledge?

A. It is possible.

* * *

(Tr. 717) Q. Have you ever observed any trees of hams with hams missing, unaccounted for, yourself?

A. Well, that would be hard to answer to that extent. I have, of course, seen trees where they would be vacant spaces, but what happened to them, I couldn't say.

Q. That vacant space, of course, might arise by the failure to put a ham on that hook?

A. That could be, or it could be something else.

* * *

(Tr. 724) Q. Can you tell me whether or not you are acquainted with the amount of meat that was allocated to the cafeteria during 1949 or 1950?

A. I am not acquainted. I have no records of that.

Q. You don't know what, if any, was allocated?

A. I know there was some.

Q. Allocated?

A. I think there was. I know they did have a lunch for the men.

* * *

(Tr. 729) Q. Do you have any way of telling me what the volume of bone, or other parts of the pork that was removed in preparation for hotel and restaurant cuts, amounted to?

A. No, sir.

* * *

(Tr. 730) Q. Is Sucher Packing Company completely refrigerated throughout?

A. Completely?

Q. Yes, sir.

A. We have rooms that are not refrigerated.

Q. And some that are?

A. Yes.

* * *

(Tr. 731) Q. Can you tell me whether or not you agree with this statement taken from the "National Provisioner": "In the study of the difference of the shrink between the plants using completely refrigerated facilities for cooling, storing and wrapping, and shipping smoked meats, and those not using complete refrigeration, was noted to be from one-half to one and one-half percent." Would you agree with that statement, Mr. McConkey?

A. If I understand the question correctly, where there were wrapping rooms and chill rooms, the shrinkage would be one to one and one-half percent?

Q. No, sir. ½ to 1 and ½ percent.

A. I would say that would be a fair average in between those figures.

Q. Do you agree with this statement: "Assuming the average price of 50 cents for smoked meats and an average tonnage of 70,000 pounds a week, a packer, without (Tr. 732) complete refrigeration, might be losing from $175 to $525 per week."?

A. He evidently figured it.

Q. I mean, would you agree or disagree with that statement?

A. It sounds reasonable.

* * * *

(Tr. 733) Q. As a matter of fact, the shrink depends upon many factors, doesn't it?

A. It does.

Q. And isn't it one of the bugaboos of the meat industry?

A. It is.

* * * *

(Tr. 735) Q. Can you tell me whether or not during the time that you have been at the Sucher Packing Company, and I mean now in 1949 and 1950, you have had any breaks in the refrigerating system?

A. Breaks in the refrigerating system? It is quite possible.

* * * *

(Tr. 739) Q. Mr. McConkey, do you know of any investigation which was attempted at the Sucher plant during 1949 and 1950, while you were there, except the one which arose as a result of your apprehending William Harris?

A. I don't remember of any investigation.

* * * *

(Tr. 741) Q. So at that time, actually, the Sucher Packing Company was just beginning to inaugurate a count system to try to get accuracy?

A. A count, but not weight.

Q. And an inventory count to try to get accuracy, weren't they?

A. That could be correct.

* * *

Ray McConkey Redirect Examination

* * *

(Tr. 742) Q. Prior to the time they made a record of the actual number of pieces, was there a record of the weight inventory?

A. The record of the weight was used.

* * *

Ray McConkey Recross Examination

* * *

(Tr. 743) Q. You were inaugurating a count system to attain accuracy, weren't you?

A. We were.

* * *

Burton Davis Cross Examination

* * *

(Tr. 752) Q. Have you ever made an inspection of the Sucher Packing Company before this morning?

A. Our company has.

Q. Have you, I said.

A. No.

Q. So, you were sent over here at the request of Mr. Beerman to testify in this case?

A. That's correct.

* * *

(Tr. 759) Q. Now, in order to determine the chilled cooler weight, you would take the weight of the animal before it goes into the cooler room, wouldn't you?

A. Correct.

Q. And you would then take the weight of the animal when it comes out of the cooler room, wouldn't you?

A. That's right.

Q. And that is what you would refer to as cooler shrink, isn't it?

A. Cooler shrink only.

Q. Now, I hand you what has been marked as Plaintiff's Exhibit 6, and ask you to read the first line under "Notes No. 1".

A. (reads) "Fresh pork carcass weight is dressed weight after deducting 3 percent of the amount for cooler shrink".

* * *

(Tr. 762) Q. And on those product analysis or sales analysis sheets, you observed a figure representing percentage of shrink?

A. I did not. I only saw the overall tonnage figures.

Q. Let me ask you again. Maybe you misunderstood my question. Did you, at any time, when you went to the Sucher Packing Company this morning, see any shrink percentage records?

A. No.

* * *

(Tr. 764) Q. In going to these other plants, do you see any record of their shrinks?

A. Yes.

* * *

(Tr. 766) Q. Did you ask to see any records of cooler humidity or temperature?

A. No.

Q. That would not affect—

A. I asked about records and they said for a certain period of time they were destroyed because they became bulky.

Q. The records of humidity and temperature for the period 1948, 1949 and 1950, they said, were destroyed?

A. Well, they had gotten away, anyway.

* * *

(Tr. 768) Q. Let me ask you this: Again referring to pork – if I happen to mention beef, there is no more beef and no more veal in this case. In your experience, can you tell me, Mr. Davis, whether or not if a hog remains in a cooler for three days instead of one day, the shrink would increase or decrease?

A. It would increase.

* * *

(Tr. 769) Q. Now, let me ask you another thing. Did you ask the Sucher Packing Company where the source of these hogs was, where they bought them?

A. No.

(Tr. 770) Q. Do you consider the source of the purchase of the hog to be any factor whatsoever in shrink?

A. Yes.

Q. But you didn't ask about that record, did you?

A. I presumed they are mid-western hogs and corn fed.

Q. Mr. Davis, did you ask to see the record?

A. No.

Q. Did you ask whether or not they were corn fed hogs, or other fed hogs, at the Sucher Packing Company?

A. No, I didn't.

Q. Do you mean to say to this jury that the shrink of a corn fed hog would be the same as the shrink of a slop fed hog?

A. It would be less.

Q. Did you attempt to determine what kind of hogs you were going to testify about today?

A. No.

* * *

(Tr. 771) Q. As a matter of fact, isn't it true that almost every packer obtains the shrink from the conditions existing in that particular plant?

A. Yes.

Q. And, therefore, the conditions existing in the plant also must be considered as a factor in determining shrink by the management, would it not?

A. That is true.

* * *

(Tr. 774) Q. Then, may I ask you again, whether or not the breed of the animal, whether it be a lean hog or a lard hog, would have any effect upon its shrink?

A. I don't know.

Q. You don't know that?

A. I don't know that exactly.

Q. Do you think it would have an effect upon the yield?

A. Yes.

Q. And wouldn't the lard hog have a greater shrink than the lean meat hog?

A. It would. I mean, to a certain extent, yes.

* * *

(Tr. 778) Q. Did you ask what they held the temperature at in 1948, 1949 and 1950?

A. Yes. I said "What is the normal temperature you hold in this room"?

Q. What was it?

A. Right now at the present time?

Q. Then. You didn't make any inquiry what it might have been back in 1948, 1949 and 1950, did you?

A. No, I didn't.

* * *

(Tr. 787) Q. Would you say that packers who use humidifiers would get – normally get a lower shrink?

A. Yes.

Q. But you didn't ask out there whether or not humidifiers were used? I mean, Sucher Packing Company.

A. No.

Q. That is another factor that would affect shrink, would it not?

A. Yes, humidity does affect shrink.

* * *

(Tr. 798) Q. Did you ask Sucher, or Mr. Smith, the equipment that they were using in 1948, 1949 and 1950?

A. No, I did not.

* * *

(Tr. 799) Q. Let me ask you whether or not these variable factors would, in your opinion, affect shrinkage: 1. Air circulation; 2. Relative humidity in the cooler; 3. The position of vat covering; 4. Manner in which the cooler is used; 5. The frequency with which the door of the cooler is opened and closed during the period of time; and the removal or addition of hot carcasses, would those factors affect weight shrinkage?

A. All of them, yes.

* * *

(Tr. 800) Q. I was referring to pork. Would these factors affect the cooler shrinkage on pork?

A. Yes, they would.

Q. Would these factors affect the cooler shrinkage on processed pork, such as fresh hams, Boston butts, loins, and so forth?

A. Yes.

Q. Would these factors affect the cooler shrinkage on smoked products?

A. Yes.

Q. Would these factors affect the degree of shrink on sausage and sausage products?

A. Yes.

* * *

(Tr. 801) Q. Would the fact that hogs were kept in a cooler over weekends affect the shrink?

A. Yes.

* * *

Burton Davis Re-Cross Examination

* * *

(Tr. 807) Q. Of course, there must be some refrigeration in the cooler room, mustn't there?

A. That's right.

Q. And the degree of refrigeration is a very important factor, isn't it?

A. That's true.

* * *

Rulings of Court

* * *

(Tr. 817) MR. GOLDMAN: Suppose, it is conceivable — I hope this result will never occur — but it is conceivable that the jury might allow us only $291.14. That is a possibility and I think that if the defendant at one time or another has admitted that we found the following items (Tr. 818) and amounts as being lost within the terms of the contract, that is an admission and it is just as if the President of the company wrote it as if the attorney for the company writes it, when he is representing them. I think we are entitled to the benefit of that.

* * *

(Tr. 846) The case is now before the Court on the motion of defense for a directed verdict, and at this time I will overrule that motion. Counsel for defendant may renew it at the proper time and the Court will at that time announce a more complete decision on that question.

Are you ready to proceed?

MR. SELVA: Yes.

* * *

W. H. Bruner Direct Examination

* * *

(Tr. 847) Q. Will you state your name to the jury?

A. W. H. Bruner.

Q. Where do you live?

A. Columbus.

Q. And what is your vocation?

A. I am employed by the Agricultural Extension Service, Ohio State University, as swine specialist.

Q. Is that in the form of animal husbandry?

A. I have a joint appointment, with animal science and agricultural economics, marketing.

Q. How long have you been engaged in swine inspection work?

A. Since 1949.

* * *

(Tr. 849) Q. Can you tell me, over this period of years what the cooler shrink has been in your experience?

A. I think it would be safe for me to say that most of my work has been done with hogs 188 to 230 pounds and a normal shrink might be expected from hot to chill, to be 2½ to 3 percent.

Q. Can you tell me whether or not any additional shrink would arise if the animals are held in the cooler longer than a 24-hour period?

A. For each additional 24-hour period the carcass is in the cooler?

Q. Yes, sir.

(Tr. 850) A. Plus the original 24?

Q. Yes, sir.

A. Half of a percent, I would say, would be a fair, normal figure there.

Q. Would that be for each day?

A. Each 24 hours.

* * *

(Tr. 852) Q. Can you tell me what your experience has been with regard to cutting shrink? What percent, if any, is allocated to cutting shrink as a result of your experience?

A. I suppose that is the hardest question you have asked me, or hardest for me to answer, because you weigh the carcass as one weight. You get these individual pieces or cuts and get nine or ten or eleven different weights for the carcass. You have different people weighing. This cutting

shrink is a hard thing to answer. I would say, based on my own experience, I find a variation of ½ to 1 and ¼ percent.

Q. That cutting shrink in addition to the cooling shrink–

A. That's right.

Q. (continued) –would be anywhere from ½ to 1¼ percent?

A. Yes, sir, based on my experience.

Q. Where has that experience been, again, generally?

A. Processing plants as well as the laboratory experience.

Q. Those are meat packing plants, processing plants?

(Tr. 853) A. Yes, sir.

* * *

Q. And then the size or weight of a hog that is put into the cooler, would affect the question of shrinkage?

A. Yes, very definitely.

Q. And then, would the question of temperature affect shrinkage in the cooler?

A. Temperature and humidity, air velocity, all have a profound effect upon shrinkage.

* * *

W. H. Bruner Cross Examination

* * *

(Tr. 875) Q. Now, in figuring what might be called normal shrinks, Mr. Bruner, you take into account, do you not, the various variables such as variations in humidity and temperature and air circulation? And breed of cattle, if (Tr. 876) that is a factor, the amount of fatness in the cattle and any other variable there is, and come to an average figure, do you not?

A. That's right.

* * *

W. H. Bruner Redirect Examination

* * *

Q. Let me ask you, Mr. Bruner, Mr. Goldman has asked you about various temperatures, humidity, and atmospheric conditions, and weight of animal and number of carcasses. If you had none of that before you and were asked to determine the shrink of an animal passing through a cooler, with no knowledge of what the temperature, whether it be 34, 54, or 104, no knowledge of the weight of that (Tr. 877) carcass, no knowledge of the air humidity, no knowledge of the temperature, no knowledge of any of the conditions going on in that cooler room, would you be able to give an estimate of the cooler shrink on that animal without any of the factors before you?

* * *

MR. GOLDMAN: I object.

THE COURT: I will sustain the objection.

* * *

Robert Bowser Direct Examination

* * *

(Tr. 879) Q. Will you state your name?

A. Robert Bowser.

Q. Where do you live, Mr. Bowser?

A. I live at New Lebanon.

Q. Are you married?

A. Yes, sir.

Q. What is your occupation?

A. Well, I am a butcher by trade and I manage a small packing plant out there.

* * *

(Tr. 880) Q. First, I want you to tell me what cooler shrink is, Mr. Bowser.

A. My own impression of cooler shrink would be the difference in weight between the hot carcass put in the cooler and the chilled carcass when it comes out of the cooler.

Q. And you have a cooler in connection with your small packing plant?

A. Yes, sir.

Q. Can you tell me at what temperature you keep the cooler?

A. We maintain a cooler temperature of 34 degrees.

(Tr. 881) Q. And when you place the animal in there, is that the hot weight?

A. That's right.

Q. And when the animal is taken out – after how many hours?

A. 24 hours.

Q. Is that the cold weight?

A. It is the chilled weight, yes.

Q. Can you tell me what degree or percentage of shrink of the carcass takes place in the cooler?

MR. GOLDMAN: I object. Reference only to his plant wouldn't have any bearing in this case.

THE COURT: Overrule the objection.

MR. SELVA: Will you please read the question to the witness?

(Thereupon the last Q. was read by the reporter.)

A. In the first 24 hours?

Q. Yes, sir. I mean the first 24 hours.

A. We figure 3 percent for shrinkage.

* * *

(Tr. 882) Q. Can you tell me, if in your cooler in your packing plant, there is any additional shrink for any additional time held over 24 hours in the cooler?

* * *

A. We figure the first 3 days it would probably average around 1 percent.

Q. In addition to the shrink of the first 24 hours?

A. In addition to the original 3 percent.

* * *

Q. Can you tell me, please, Mr. Bowser, during that period of the additional three days, at what temperature the cooler is kept.

A. We maintain a 34-degree temperature.

* * *

(Tr. 883) Q. Will you please tell me what is referred to as cutting shrink?

A. Cutting shrink would be the loss that you would have in cutting up a carcass, due to bringing it out of the cooler into a warm room where you would be working, you would have a shrink through dehydration, while it was out, and you would have some shrink due to bone cutting and bone waste you would cut with a saw.

Q. Can you tell me, from your experience in your plant, from any extension work that you have done, what, if any, cutting shrink occurs in the cutting room?

A. 1 to 1¼.

(Tr. 884) Q. Is that precent?

A. 1 to 1¼ percent, yes.

* * *

* * *

(Tr. 889) Q. How did you compute your cutting shrink?

A. You mean from the carcass into primal cuts?

Q. How do you compute your cutting shrinks figure that you gave?

THE COURT: Did he testify on cutting shrink?

MR. GOLDMAN: Yes. He gave a figure.

MR. SELVA: Yes, he did, 1 to 1¼.

Q. How did you figure that?

A. You take your carcass and cut it into primal cuts and weigh each primal cut.

* * *

(Tr. 890) Q. Isn't it a fact, Mr. Bowser, in attempting to arrive at a cutting shrink in that way, there are so many unreliable factors to be considered that the result is also not very reliable?

MR. SELVA: Object.

THE COURT: Overruled.

A. We have not found it to be unreliable in our experience where we have made the tests for our own use. You have the same factors to put up with. You have so much bone you are going to have to saw through and you are going to have a certain percent of dehydration while the meat is out, moisture getting out of the meat. If you cut a ham, there is a certain amount of blood in the ham that will run out. If you weigh up each individual piece after you are finished, you are going to get some results.

* * *

PAGE 915 — LINES 1 THRU 15 — MISSING

Elliott Sachs Direct Examination

* * *

(Tr. 925) Now, on these sheets there is no column entitled "shrinkage" on "allowance for shrinkage". The shrink or gain column represents only figures showing the gain or loss in weight as a result of an arithmetical computation. It does not represent shrinkage from process of cutting shrink or holding shrink, or any other type of shrink.

* * *

(Tr. 934) Q. Now, the errors that you have related arising out of these transfers by round numbers, have what, if any, effect upon those figures in that closing inventory for fresh pork?

A. They make it incorrect.

* * *

Q. Now, tell the jury what you found, from your examination of these weekly sheets, Exhibits 2 and 4, as to the figures at the end of the inventory for one week and the figures for the opening inventory of the following week.

A. Well, the figures representing the closing (Tr. 935) inventory of any week become the opening inventory of the following week. They are just transferred over. Taken right over as the beginning inventory.

* * *

(Tr. 942) Q. Do you have any more?

A. The inventory of dressed hogs for the week of November 26, 1949, reading 166 cold hogs hanging, 32,000 pounds.

Q. No average on that?

A. No, sir.

Q. Just the one figure?

A. Just the figure, 32,000 pounds.

* * *

(Tr. 947) Q. Now, would you explain to the jury, where you say errors have occurred in this multitude of computations and calculations that you have recited?

A. By the taking of average weights to represent the weight of a total group of objects.

* * *

(Tr. 953) Q. Now where, if anywhere, on those weekly sheets we find those figures which in the first period totalled 4½ million, and in the second period totalled 6¼ million, approximately? Where, if any, figures do you find any shrinkage figures for that fresh pork held from Friday to Monday?

A. There is no shrinkage listed anywhere on the product analysis sheet.

* * *

(Tr. 955) Q. Have you seen any inventory comparing the closing of one week with the opening of the next week which shows any differences caused by shipments, spoilage, shrinkage, or anything else?

A. The figures for the closing inventory of any week are the opening inventory figures of the following week.

Q. You didn't hear my question. Have you ever noticed any differences where there was any shipments out?

A. There are no differences in the figures.

Q. How many days have elapsed from the time the closing inventory was taken with all this pork in it, (Tr. 956) until the opening inventory is calculated the following week?

MR. GOLDMAN: Now, I object, unless this witness knows of his personal knowledge when that period starts.

THE COURT: I will overrule the objection.

MR. GOLDMAN: Exception.

A. Two days.

Q. And what happens to that pork during those two-day periods?

A. It stays in the plant.

* * *

(Tr. 963) Q. But on the sheets that support the alleged claim on which this suit is brought, Plaintiff's Exhibit 6, Plaintiff's Exhibits 21 and 22, what, if any, credit do you find for any lard sold, either in pounds or dollars?

A. None.

* * *

(Tr. 964) Q. What, if any, reports have you seen from the Sucher Packing Company for the period covered by this litigation, December, 1948 to September, 1950, pertaining to temperature in rooms, chill rooms, cutting room, smoking room, or humidity in any of those rooms, or air conditioning in any of those rooms?

A. None at all.

* * *

(Tr. 974) Q. No record whatever. When, if at all, did you ever see any inventory prepared by the Sucher Packing Company, at any time during this period, which inventory was based on exact counts and exact weights?

A. I never saw any.

* * *

(Tr. 985) Q. In other words, they changed the end period from September 30th to September 10th; is that right?

A. September 9th.

Q. 9th?

A. That's correct.

Q. So, the last three weeks they give us credit for those instead of charge. Right?

A. Well, by averaging.

Q. Do they give us a credit instead of a charge?

A. There is a credit for it, yes.

Q. But the 1,706,000 that starts out on the old account or exhibit, is still the figure that runs to September 30th; isn't it?

A. That's correct.

* * *

(Tr. 986) Q. I wish you would read to the jury what the original bill, or account, or exhibit, prepared by Mr. Hadeler showed to be the total pounds of pork for which the defendant was charged for the last three weeks.

A. 21,408.

Q. And the dollar value of the same is—

A. $6672.02.

Q. And for that $6672, how much credit on this new arrangement did Mr. Goldman give us?

A. $1749.81.

Q. All right. Any other charges and credits over that three-week period?

A. On smoked pork there is a credit on this sheet.

Q. What is the charge – what is the original charge first, as prepared?

* * *

(Tr. 987) A. 9804 pounds at the dollar value set forth in Mr. Hadeler's schedule, came to $3668.90.

Q. And for that $3668.90, how much credit did Mr. Goldman allow us on his Exhibit No. 22?

A. $1028.19.

* * *

(Tr. 988) Q. Now, let's look at Mr. Goldman's Exhibit 22 which he granted by these generous allowances – withdraw the word "generous" – these allowances, and I think you said that exhibit starts out the same as the original exhibit, Plaintiff's Exhibit 6, in the second period, with 17,069,507 pounds; is that right?

A. That is correct.

Q. So he never deducted all these pounds that you have just told us were in the last three weeks, from the 17 million figure?

A. That's correct.

* * *

(Tr. 992) Q. So that, when you figure it out, the original figure of 17 million is the same on both exhibits, and the totals of all the columns, all the way through, are the same; is that right?

A. Excluding beef and veal from Mr. Hadeler's original schedule.

* * *

Elliott Sachs Cross Examination

* * *

(Tr. 999) Q. What records did you ask for that they did not make available?

A. I asked for the general ledger, general journal, journal vouchers and for audit work papers; also for records covering temperature, humidity, changes of air, circulation, during these periods to which you refer, and other records, too, which were not made available.

* * *

(Tr. 1008) MR. GOLDMAN: I am going to ask the witness about Exhibits 21 and 22, and I wonder if I might, so the jury understands the questions, if I might give them each a copy. They have had them before, Exhibits 21 and 22.

MR. PICKREL: We object to that. That is Exhibit 22 is entirely inaccurate, as we have shown. It has been prepared now for the third time, if the Court please, and it still contains all these original figures that is found in

the original Exhibit 6, which had been prepared back in September, 1951. Now, he changed Exhibit 21. Then he changed it to Exhibit 22. But Exhibit 22 is still faulty, and should not go to the jury unless and until it is corrected.

* * *

(Tr. 1056) MR. GOLDMAN: And those figures show there was a lot of beef in the sausage.

MR. PICKREL: Then you show it.

(Tr. 1057) MR. GOLDMAN: He said he examined beef as well as pork.

MR. PICKREL: You took beef out.

* * *

(Tr. 1067) Q. By all means, explain.

A. I examined these product analysis sheets, (Tr. 1068) as I explained yesterday, and I found round numbers, approximations, approximation of weights. I found approximations in inventory and the weights. As I mentioned yesterday, product transfers-out in round numbers from fresh pork affected the balance remaining, or supposed to be remaining, in fresh pork. If one is wrong, the other is wrong. I said yesterday that the use of round numbers, these 1400 and 1600 round numbers, transfers-out, was incorrect because it was not an exact weight and the result would be that the amount of fresh pork remaining on hand, would be not exact and inaccurate. That was also true of inventory taken on these figures of – that appear on the product analysis sheets. I also stated yesterday, that on this product analysis sheet, there is no allowance whatever for any shrink, any line, any column, on this sheet.

I also pointed out through an exhibit that was introduced here, that at least 4½ million pounds of this original 9¾ million pounds was held in inventory for at least two days in which there should have been an additional shrink, but

none of these are reflected on the product analysis sheets. So, for me as an accountant to take this record and to trace out and see what should have been on hand, was an impossibility.

* * *

(Tr. 1071) Q. Now, you stated, Mr. Sachs, to the best of your knowledge lard is not involved in this claim; is that right?

A. I said specifically, Mr. Goldman, that lard appears nowhere on Exhibits 6, 21 and 22.

* * *

Elliott Sachs Redirect Examination

* * *

(Tr. 1103) Q. You related on cross-examination a number of items for which you inquired at the Sucher Packing Company, for purposes of inspection, such as the general ledger, the journal, the journal vouchers and the work papers that support them; the temperature, humidity and air movement records, the purchasing records concerning purchase of equipment, the depreciation schedule and work paper. When, (Tr. 1104) if at all, did you ever see or get any of them?

A. At no time.

* * *

* * *

(Tr. 1132) MR. PICKREL: I should like to have the record show that we now move the Court to dismiss this case for the reason that there has been no proof of claim presented by the plaintiff at any time involving the amounts or issues now before this Court, and for the further reason that the original proof the claim filed shortly after the same arose, (Tr. 1133) being dated the 3rd day of January, 1951, was followed by a lawsuit filed in this court for the amount set forth in such proof of loss, was filed on the date just mentioned. That thereafter, to-wit, on the 29th day of November, 1954, being more than three years thereafter, the plaintiff filed in this court an amended, or a second amended complaint, setting up an entirely different amount on entirely different valuation. Now, the cause is about to take the turn that we are to try the case of certain theft by certain specific individuals and no proof of claim or loss has been made in accordance therefor, and therefore, this case should be dismissed since the same is not accomplished in the manner required under the contract or policy of insurance.

We should like to offer some sworn testimony to support this motion. I would like to call Mr. Solomon and have him sworn, please.

MR. GOLDMAN: I object to such proceeding. The case has been closed, all parties have rested, your Honor.

* * *

(Tr. 1138) MR. SELVA: May it please the Court, in view of defendant's present position, we respectfully request a realignment of the exhibits and respectfully request an order requiring plaintiff at this time to produce original statements of Helen Hurt, James Maiden, William

Harris, James Jackson and Willie Early, for submission to the jury.

THE COURT: That motion will be overruled. It is correct that only those exhibits which will be pertinent to the issues now before the jury should be submitted to the jury, if you can ascertain this before the case goes to the jury.

* * *

Excerpts from Argument of Mr. Goldman

* * *

(Tr. 1140) And I may say to you also, in consideration of the case, at this point, sausage may be eliminated, as the testimony of Harris, with respect to sausage is too indefinite. So, the case now is restricted and confined to fresh pork and smoked pork.

* * *

We also reduced the claim, because we found we had not in our figure given credits of certain amounts we should have and we gave those credits and reduced the claim on the other items. Now I think the claim is down to the (Tr. 1141) bare bones, in the fresh pork and smoked pork.

* * *

(Tr. 1153) I submit to you, Ladies and Gentlemen, that in this case your problem has been much simplified by his Honor's ruling out all the figures which would have been a very difficult job. It involved a lot more work and even manpower in lugging the exhibits. You have a very simple fact to determine at this time.

* * *

Excerpts from Argument of Mr. Goldman

(Tr. 1154) Now it so happens under the terms of this policy we are limited to only those five employees who have been identified, and I think Early was in the ring only a short period, and all we are entitled to is $20,000 for each of the employees who acted alone or in collusion with others. So that, our maximum recovery cannot exceed $100,000 under the terms of the policy, even though our loss may have been considerably greater. But for the ring, four employees, during the period that they acted, we are entitled to recover at least the $80,000. And I submit, frankly, I don't believe that while Willie Early was a member of the ring there was as much as $20,000 taken. He was a member for too short a period.

* * *

(Tr. 1187) Now, as far as Jackson is concerned, we had him on the stand. I leave it to you whether we should have brought in Maiden, Hurt and Early. Are these people who have been convicted going to take the stand and admit the commission of crime? What chance would we have? Isn't that ridiculous? If they felt they would deny it, they had the same opportunity. they could have called them.

* * *

(Tr. 1188) As far as the claim being reduced, that is the only fair thing to do. When we filed our proof of loss, we thought our loss was that much. We are frank to say we can't prove it. And rather than waste more time, we have eliminated it. That is to the benefit of the defendant. They have no kick coming. We have eliminated the beef and veal. We have eliminated these other items. We have tried to make it fair and reduced it to a minimum.

* * *

Excerpts from Charge of Court

* * *

(Tr. 1199) On cross-examination, William Harris was confronted with a statement he had made to Mr. Merica, the detective at the time of his arrest. It is proper for the purpose of testing his veracity. He admitted that in that statement he had answered a statement to Mr. Merica that Jimmy Jackson got him to stealing hams about three weeks before his arrest. He explained this by saying that he meant he had been hauling three weeks.

You are the judges of the credibility of the witness, and it is up to you to determine how much reliance to place on his testimony.

* * *

(Tr. 1200) Now I have prepared for you a document entitled "Special Verdict". It may seem long and it may seem complicated, but I think if you will take it step by step and attempt to pass upon the questions that are submitted, you will not find it too difficult. This is the means by which you make findings of fact and report those facts to the Court.

You are not limited to what is submitted here. If you find that other facts are important that you wish to make a finding on, considering the issues in the case, you may make additional findings that are not indicated in this document.

* * *

(Tr. 1207) You should not be swayed or influenced by any feeling of sympathy or prejudice. It is your duty to carefully reflect upon all of the evidence before you and make your finding in accordance.

Let your only effort be to arrive at a just and fair verdict between the parties.

Excerpts from Charge of Court

If you consider anything that the Court says in this charge as an expression of opinion on any disputed question of facts, you may disregard it, because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses. It is peculiarly in the province of the jury to judge of the credibility of the witnesses. That is to say, the extent to which they should be believed and the importance and weight to be given to their testimony. You may believe all of any witness' testimony, or you may disbelieve all of it; or you may believe it in part and disbelieve it in part.

* * *

Defendant's Exhibit C.

Attach V

SUCHER PACKING COMPANY
FRESH PORK IN INVENTORY
AS SHOWN ON PRODUCT ANALYSIS SHEETS

FIRST PERIOD				SECOND PERIOD	
WEEK ENDED	DRESSED HOGS	FRESH PORK	TOTAL FRESH PORK	WEEK ENDED	TOTAL FRESH PORK
12/4/48	36 Head	54511	42234	11/5/49	103261
12/11/48	-	84550	47151	11/12/49	89221
12/18/48	94 Head	86694	52915	11/19/49	86427
12/25/48	257 Head	47124	30126	11/26/49	224901
1/1/49	-	45451	20447	12/3/49	88530
1/8/49	-	41636	40127	12/10/49	220755
1/15/49	-	38118	41104	12/17/49	190487
1/22/49	94 Head	45035	39113	12/24/49	63721
1/29/49	200 Head	30200	36670	12/31/49	82199
2/5/49	-	42234	32460	1/7/50	179126
2/12/49	273 Head	41123	28707	1/14/50	186195
2/19/49	239 Head	31559	36491	1/21/50	234457
2/26/49	287 Head	42587	57828	1/28/50	178897
3/5/49	213 Head	32163	51561	2/4/50	160337
3/12/49	252 Head	41044	45256	2/11/50	157197
3/19/49	236 Head	43186	51171	2/18/50	157598
3/26/49	334 Head	50434	53803	2/25/50	137867
4/2/49	479 Head	77094	58643	3/5/50	143896
4/9/49	287 Head	43337	56020	3/11/50	171107
4/16/49	263 Head	44267	58268	3/18/50	165655
4/23/49	228 Head	34428	64764	3/25/50	133627
4/30/49	347 Head	56169	39425	4/2/50	144550
5/7/49	486 Head	76307	68405	4/8/50	135003

4/16/49	263 Head	44768	58768	103530	3/18/50	165655
4/23/49	228 Head	34478	64764	99168	3/25/50	133627
4/30/49	340 Head	56169	39425	95594	4/2/50	144550
5/7/49	486 Head	76308	68405	144707	4/8/50	135003
5/14/49	338 Head	51035	35138	86176	4/16/50	138307
5/21/49	367 Head	55417	47850	103267	4/23/50	150861
5/28/49	342 Head	82160	30297	112457	4/30/50	165331
6/4/49	330 Head	53790	47725	101015	5/7/50	207281
6/11/49	390 Head	89090	36847	125937	5/13/50	229685
6/18/49	410 Head	61910	41588	103498	5/20/50	134415
6/25/49	178 Head	29404	40583	70487	5/27/50	153507
7/2/49	235 Head	45138	34076	79214	6/3/50	203938
7/9/49	—	—	57531	57531	6/10/50	169429
7/16/49	293 Head	60066	26781	86487	6/17/50	181389
7/23/49	—	—	74197	74197	6/24/50	130241
7/30/49	225 Head	47664	54510	102174	7/1/50	94750
8/6/49	175 Head	41921	58673	100594	7/9/50	42586
8/13/49	—	—	—	46481	7/16/50	105173
8/20/49	—	—	—	74084	7/23/50	65980
8/27/49	—	—	—	58359	7/29/50	94233
9/3/49	—	—	—	120088	8/5/50	95386
9/10/49	—	—	—	155107	8/12/50	80906
9/17/49	—	—	—	107698	8/19/50	100 25
9/24/49	—	—	—	88881	8/26/50	117710
10/1/49	—	—	—	17242		
10/8/49	—	—	—	135503	9/2/50	102392
10/15/49	—	—	—	173049	9/9/50	103087
10/22/49	—	—	—	117666		
				4518287		6274803

SUCHER PACKING COMPANY.

Lard Sales

Week Ended	Weight	Amount
1948		
December 4	38,293	$ 8,681.90
11	46,846	9,954.26
18	28,095	5,679.90
25	84,814	16,959.07
	198,048	$ 41,275.13
1949		
October 1	71,597	$ 11,147.59
8	57,516	9,274.50
15	52,055	8,827.42
22	39,798	6,875.06
	220,966	$ 36,124.57
1949		
November 5	56,030	$ 7,854.41
12	62,280	8,695.82
19	47,310	6,605.91
26	42,586	6,022.02
	208,206	$ 29,178.16
1950		
August 19	33,110	$ 6,487.57
26	61,338	11,443.22
September 2	44,158	8,181.64
9	70,718	12,831.90
	209,324	$ 38,944.33

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FEDERAL RULES OF CIVIL PROCEDURE

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

* * *

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Opening Proceedings

* * *

(9) THE COURT: I will overrule the motion for view of the premises.

MR. GOLDMAN: Exception, please.

THE COURT: Exceptions are not necessary.

* * *

Opening Statement on Behalf of Plaintiff

* * *

(11) The evidence will show that originally the claim was made also to include some beef and veal, but feeling that we were not going to be able to have as good evidence on that subject, we have eliminated that portion of the claim from the lawsuit and the suit is new — the claim is restricted to fresh pork, smoked pork and to a small extent sausage.

* * *

KENNETH SMITH — (Cross)

(128) Q. All right. You tell me. Where is that 3 percent taken off?

A. That 3 percent is taken off the tape that is taken off the scale where each individual hog is reported. They total up all the individual weights of the hogs. They get a total then. 3 percent is taken off and that is the (129) figure which appears here.

Q. Then this figure of the total on the right hand side under the heading "Dressed", that is the figure of the dressed animal, less 3 per cent; is that right?

A. Yes.

Q. Beg your pardon?

A. The dressed weight of the animal, less 3 percent, yes.

Q. That is the figure that is way over here on the right hand column, the total; is that right?

A. Yes, sir.

Q. And that has the 3 percent off?

A. Yes, sir.

Q. All right. How long has that been going on out there, all the time you were there?

A. Yes.

* * *

(133) Q. That is not the question I asked you. That is a very interesting answer, but I asked you if about the time you came there you were told anything about a lot of stealing that was going on?

A. Yes. Yes, I was.

(134) Q. You were told it then?

A. I don't just recall.

Q. December, 1947 or January, 1948?

A. Yes. Things were missing from the plant, yes.

* * *

(136) Q. Wouldn't your yellow sheet show what became of those carcasses that were sold as fresh pork?

A. The yellow sheets would in effect, yes. The yellow sheets show the original amount went into the department and it showed what was transferred to other departments in the plant and what was left was available for (137) sale, either as primal cuts or as dressed carcasses. It does show that.

Q. The purpose of your yellow sheets is to show the distribution of pork, isn't it?

A. That is what it does.

Q. Why wouldn't they show the amount of pork sold as fresh pork in carcass form?

MR. GOLDMAN: I object. The witness says they do.

MR. PICKREL: The yellow sheets do?

MR. GOLDMAN: Yes.

THE WITNESS: You are asking me to take a sales figure on pork and say how much is carcass, how much is

hams and loins. At this time I can't do that. They are summarized into those figures. We have charged everything went in there and they received credit for everything that was sold out of there.

MR. PICKREL: All right.

THE WITNESS: That is a summary.

* * *

(138) Q. Will you look at these weekly sheets and see if you can find where any carcass was sold?

A. No. On those sheets they show as fresh pork sales.

* * *

(152) Q. Now that takes care of that. Now, a ham roast, is that part of a hog, or is that made out of —

A. It is more of a retail cut we do not produce over at our plant.

Q. They cut from what?

A. From a ham.

Q. They cut out of a ham?

A. Yes.

Q. So you don't work on that at all?

A. No, that is retail.

Q. What about this pork tenderloin?

A. That also — that is the inside of the loin here. We sell the pork loin with the tenderloin in. We do not remove that.

Q. So the boneless ham roast and the pork tenderloin, those you do not process at all?

A. No.

* * *

(157) Q. Where also does it go?

A. The bones and indeible part of the head which is removed in the killing process, will go to the tankage room, grease and tankage.

* * *

(165) Q. And you say 38 percent of it is represented (166) by smoked meat?

A. No. I say 38 percent of it is represented by meat transferred for processing for smoke.

Q. Then is the 38 percent too high or too low?

A. I don't know. Perhaps I haven't made myself clear. For instance, that is fresh weight there. Your smoked weight is different.

Q. More or less?

A. It shrinks in the smoking process.

Q. How much?

A. That varies.

Q. Well, about.

A. Oh, perhaps on an average of 10 percent.

Q. On an average of 10 percent?

A. Yes.

Q. 10 percent from the fresh weight it shrinks?

A. No. You asked me what it shrinks in the smoking process. I said approximately 10 percent.

Q. From what?

A. From the weight that goes into smoke, which would be cured weight.

Q. It is first cured. That is where your 3 percent comes in. Right?

A. No.

Q. What percent does come in then when it is (167) cured?

A. Let's take a particular item. You take the fresh ham and you cure it. Then you cure it by pumping. The artery is exposed on the killing floor. You inject curing pickle into the artery. It is held in pickle. It shows a gain in weight.

Q. Then it will shrink 10 percent from that?

A. From the gain in weight, yes, approximately 10 percent.

Q. What should we have there, if 38 percent is not right?

A. Just what we have there.

Q. 38 percent?

A. Yes.

Q. 38 percent of that hog goes into —

A We are accounting for this hog in various stages. That is the fresh weight there that we are accounting for. All right. Now, whether that ham gains or shrinks 5 percent or 10 percent, as far as our claim doesn't make any difference, because when the ham is processed into smoked weight, we check the actual weight of smoked ham and account for those as smoked hams, not as fresh pork.

* * *

(182) Q. Where is there any record kept of the hams that go down the chute into the cellar, or is there a record kept? Can't you tell us?

A. Yes. I not only told you, showed you, I went through the records individually. It is still fresh pork. They get a hog and it is still fresh pork until it is taken away for some other purpose. When it is taken away for the purpose of curing, then a record, an entry is made of what quantities were taken for cure.

Q. Fine. That takes care of that group. What (183) about the other group that stays back in the cellar room, fresh?

A. That will be taken up to the shipping room, the quantities that they want to ship. If they don't sell them all out, they will be brought down and they will be transferred to cure, at which time a record of transfer will be made.

Q. I see. So you have a record then of every ham that goes into the curing room?

A. Yes, sir.

Q. But you don't have any record of the hams that are kept as fresh hams that don't go into the curing room?

A. That's right. But I would like to explain that. In an accounting sense, all of that probably — of the hog is considered fresh pork, and the fresh pork department is credited for those items which are transferred to other departments. So, in effect their record is when the total hog goes through. It is all there is until it is transferred to some other department or sold, at which time they are credited from a sales record.

Q. But as long as it is fresh pork, in a ham, it is still fresh pork and no separate record is kept of it; is that correct?

A. That is correct.

* * *

(184) Q. Cure, then a record is kept?

A. That is right. In other words, it is taken away from the fresh pork department and transferred to the cure department, at which time the fresh pork is credited for the weight taken.

Q. And the cure is charged with it?

A. Yes, sir.

Q. So your records will show you, at any time since you have been there, just how many hams there are in the cure department?

A. Yes, sir.

Q. So when somebody steals a couple of hams out of that department, that upsets your records; doesn't it?

A. If you have a truck of hams standing there and somebody steals two hams, you, perhaps, wouldn't recognize at that time that two hams were gone.

Q. I see.

A. When you put all the weights together and the weight does not come up, then you know there has been something happened.

* * *

(199) Q. So that in that period from December 4, 1948 to October 22, 1949, you never had an actual inventory by count, did you?

A. No. Those two periods not being fiscal closing would not be accurate, but you would only be concerned with two inventories there because the first inventory and the last, all the other intervening inventories cancel themselves out, and any percentage of error that might be in the first inventory or the last invetnory would not amount to anything.

* * *

(220) Q. In this complaint, the original complaint, the amended complaint and the second amended complaint, the Sucher Packing Company says that for three years they have certain losses, beginning in November, 1947 and three years after November, 1947 would be November, 1950. Do you have any records at all with you or anyplace else, that shows anything about any losses beginning November, 1947 up to these papers that you have prepared and brought in here, which begin in December of 1948, 13 months afterwards?

A. No. There are no records available for that period that would disclose the thefts. And the reason for that will be they were not started to be compiled until sometime thereafter. Weekly product analysis statement was not installed until a much later date.

* * *

(244) A. No. I testified our inventories at fiscal clos-

ing were made by the auditors and are accurate inventories.

Q. As of October 31st?

A. Or the Saturday nearest that date sometimes falls on the 30th, 29th, and in the period which you just mentioned, I believe one of the audited inventories was there. The second period began at the end of October, would have been the last Saturday of October, which would have been an actual inventory supervised by our auditing firm.

Q. Well, I am very sorry.

MR. GOLDMAN: Let me clarify the matter, your Honor. The first period ended October 22, 1949, but the second period began the nearest Saturday to November 1, 1949.

MR. PICKREL: November 5th.

MR. GOLDMAN: Which was the nearest Saturday to October 31st. The fiscal year was November 5th. Now, there should not be any confusion about the matter. The first period of 47 weeks did not end at a fiscal year ending. It ended October 22nd, but the second period began on a fiscal year. The second period of 45 weeks, originally 48 reduced to 45, began on a fiscal year beginning.

* * *

(245) MR. PICKREL: November 5th.

MR. GOLDMAN: I think it was the week ending November 5th.

MR. PICKREL: All right.

* * *

(259) Q. That's right. We will get to those in a minute. In other words, if you made a mistake which caused a shortage, you also made mistakes which caused overages, didn't you?

A. Yes.

Q. Those mistakes could be caused by inventory errors.

A. Yes, which washed themselves out. Or possibly sale

going through in a wrong week, as I think I (260) stated before, when the inventory is taken, operation still going on, and some particular time a person might ship out some product which has already been inventoried, and there would be a double credit to this department, and that woud offset itself the next week, because the sale went through the wrong week would affect the weekly results. But inasmuch as it was included in the period, there would be no effect on the 1947 or 1948 period results.

* * *

(272) Q. What happened on November 1, 1948 that your figures became so accurate?

A. I think I answered.

Q. Because you got there before then?

A. That's right. It is a big plant. We wanted to install a system. You don't go in and say "well, I am going to have an accounting system". You have to go through the plant. You have to train employees; tell them what you are trying to accomplish, what you want them to do, what you expect from them; have to get scales installed. All that takes time.

Q. What happened that made your figures more accurate beginning November 1, 1948? Did you install a new set of books, as a new system? You know there are various systems for keeping records. Did you install a new system (273) about that date?

A. No.

Q. Do you know of anything that happened about that date that made your bookkeeping more accurate?

A. Yes. We might have got a scale where we could weigh something in a location, which we did not have heretofore. In preparation or installation of this system, we would try a department for a couple of weeks, then drop it, and then go to another department, and at that time, or

about that time, I would say, it is when all the departments were functioning at the same time. So a statement could be prepared. Prior to that time we didn't have that.

Q. That is why you think your book records were faulty prior to that November 1, 1948?

A. When you speak of book records and books of account, they are a little different from this record. In other words, you can have perfect records, as far as total sales are concerned, and total purchases are concerned, and every other transaction, in total, your records can be perfect. But they don't break them down to various departments and so forth, and that is what these sheets do. So these sheets, in total, tie up to the total records which always existed, but the break-up on those records did not exist.

* * *

KENNETH SMITH — Redirect

(309) Q. Is there anything about the Sucher Packing Company buildings or equipment, as was there, during the period of time 1948 going toward the end of 1950 which would cause meat to shrink more than the normal shrink to which you have testified?

MR. SELVA: We object.

THE COURT: I will sustain the objection.

(MR. GOLDMAN: I will proffer that answer, too.

(Out of the hearing of the jury.)

MR. GOLDMAN: The answer to the question is "There is no such condition".

* * *

(311) Q. Now, will you please tell us, Mr. Smith, — (312) some question came up as to the manner in which the weight of products which are sold are tabulated. Are those weights — how are those weights determined?

A. Well, when an order is filled, the product is put on the scale and weighed, and the weights are entered on the sales invoice.

Q. Those weights are actual scale weights?

A. That's right, at the time the order is filled.

* * *

(329) Q. Anything else on November 5th that might be of interest? Let's see. Now, am I correct in my understanding of your testimony that this week of November 5th is the end of the fiscal year period reflecting your actual count inventory?

A. It seems that November 5th would be the first week in the new year and would indicate that the opening inventory was at the closing of the fiscal year, which inventory was supervised by our auditors and which inventory is correct.

Q. All right.

A. The beginning inventories.

Q. And that inventory supervised by your auditors was an actual count inventory where they went right around and counted every piece?

A. Yes, as near as humanly possible.

Q. And that, then, is reflected in your November 5, 1949 figures which are now in front of you?

A. Yes.

Q. So that any errors then, as I understand, that had occurred early in the year, were all washed out on this actual count inventory at the end of your fiscal year, on or about October 31st?

A. As far as inventories are concerned, yes.

Q. They were?

(330) A. In an — a series of figures in a cumulative period the opening inventory at the beginning period and

the closing inventory at the end period would be the only two inventories that would affect final results. The other 45 inventories would have no effect on the 47-week period.

Q. This sheet right ahead of you is based on an actual count inventory?

A. Yes.

Q. November 5, 1949?

A. Well, no, it would have been October 29th or 31st. That is where you start from. November 5th is the ending day for that particular week.

Q. But that actual count inventory had taken place prior to the preparation of this statement for the week ending November 5th?

A. Yes. You finish up one week and start with the next. What you have left at the end of one week —

Q. But this particular November 5, 1949 statement contains the results of your actual count inventory taken at the end of that fiscal year?

A. Yes, that is the inventory — the opening inventory of this week is the inventory that we end up our fiscal year with, the prior fiscal year.

* * *

ABE SOLOMON — Cross

(360) Q. All right. Eliminate the word "again". So your reduction, which represents the amount of meat during the period of the claim, pork products which were given to the employees of the Sucher Packing Company without charge, represents an estimate?

A. The figures used in the claim reduction represents an estimate, yes.

* * *

(376) Q. And you can tell me whether or not the

processing of hogs in 1950, from the time you got there, (377) is about the same as it is today?

A. In most respects, yes.

Q. And the capacity of the cooler is about the same in 1950 as it is today?

A. Yes, sir.

Q. And the general hog operations in cutting and trimming and whatever you do, was about the same in 1950 as it is today?

A. Yes, sir.

* * *

Q. You have testified that the operations were about the same, haven't you?

(378) A. Yes, sir.

* * *

(396) Q. Where does the fat go to?

A. The tank truck is right at the side of the man during the cutting and it passes out of the room when loaded, loaded on a scale and sent to the lard department.

* * *

(402) Q. Are those weekly analysis sheets taken by various departmental employees?

A. Yes, sir. The information to make them up is provided by people throughout the plant under the supervision of their foremen.

Q. Under the supervision of the foremen?

A. And the superintendent of the particular department verifies the transfers.

Q. Then you have certain employees who would make a record of these various component parts and turn it into the supervisor of that department?

A. That's right.

Q. And then where would the supervisor take that compilation?

A. He would take it to the office of the cost accounting office.

Q. And then you have other employees there?

A. Yes.

Q. And here are a number of figures now in (403) different categories that have been taken in, we will say, pork department. What is done by the young lady or the young man in the office who gets those figures?

A. They compile them. They come up with a composite transfer of a particular item for the week; they enter them on work sheets.

Q. They put them on work sheets, do they?

A. Yes, to add them.

Q. Then, we have the original sheet and we have — original sheet of the compilation and we have the work sheet. Now, where does the work sheet go?

A. The work sheet becomes part of the — along with the original compilations becomes part of the records which eventually end up in this product analysis.

Q. Who finally gets all of these various totals to enter them on the weekly product analysis sheet?

A. The person who is normally the cost accountant in the plant, who works up the product analysis.

* * *

(417) Q. I am not asking you what you felt. I am asking you what you did.

A. We took our loss for the period and in order to avoid any difficulty, we just took 1/16 of it and reduced it in order to come back to the weeks which could be stated were in the period on the claim. We made no claim for any week after September 11th, although perhaps we could have.

* * *

(444) Q. Now, initially, that was 11,104, wasn't it? See that one that is erased there and that was changed to 1104.

A. It might have been. It looks like there is an erasure.

* * *

Q. It is obvious. That is how we happened to see it.

A. The figures don't bear out any 11,000 pounds.

Q. That is why it was changed to 1100?

(445) A. Those are the actual figures.

* * *

A. I don't recall what we did on that specific date of April 23, 1950, but I can repeat what our procedure was in all the weeks that I was there. These sheets are the result of a large number of other sheets containing basic information, sales inventories, at the beginning period, and ending period, sales analysis. When we come up with a figure, that is out of line as this one, we would go through our figures, recheck them, trying to eliminate the possibility that any part of the loss was not due to theft and it was due to any error on our part.

Q. And you were looking for errors, weren't you?

A. Certainly.

(446) Q. Sure.

A. Any correction we might have had we would have made before this figure was left here.

THE COURT: Your figure, after the investigation was made, was still left?

THE WITNESS: That is right.

* * *

(480) Q. Who would cut those pork and hams and loins for the hotel and restaurant trade?

A. At the time that we had it, we had a separate department, fabricating the pork.

Q. Would you bone it?

A. Certain items were sold with bones removed, yes.

* * *

ABE SOLOMON — Recross

(559) A. We know from experience that the net deviation would be very small, would be between 5 and 10 pounds a vat.

Q. Between 5 and 10 pounds a vat?

A. Roughly.

Q. All right, roughly. What would the deviation be in the week ending January 15, 1949 in hams?

A. I would say it would probably be zero, because there would be as many vats over 1400 pounds as there would be under 1400 pounds.

Q. I didn't ask you that question. It is (560) interesting because you say there would be as many pounds over as under; is that right?

A. Probably would.

* * *

(561) Q. Mr. Solomon, I want to call you attention, and it may be that I have overlooked it, to lard. Is there any item here on this analysis sheet for lard?

A. Well, lard is not included in the claim. That is not considered fresh pork.

Q. I know. But it comes out of that 9,000,000 pounds of fresh pork?

A. Yes. The pounds in these lard tanks, and I don't know whether they are included in these work sheets.

Q. (No question)

(562) A. I don't know. I will see if I can find it. Here it is: 41,481 pounds of fresh pork transferred to lard.

Q. Where did you get that 41,000-pounds figure?

A. Here (indicating).

Q. I know it is there, but where does it come from?

A. It would come from a total of the weights going into lard, which weights are not with these papers.

Q. It matches up in the dollars with the lard, so I know it is the same thing. There is a dollar value of the lard of $5528.08, is the amount that is set opposite this 41,481 pounds. Therefore, lacking the other papers where this lard weight was listed, I know that 41,481 pounds is credited to fresh pork of the fats that went to lard.

Q. It is not shown on this transfer inventory?

A. It is shown in total and the detail must be in some other papers in that week's envelope.

* * *

(563) A. This business is complicated. Part of the lard that goes into the tank came off the kill and, therefore, they are not a part of the 9 million pounds because they are not weighed. They are not part of the weight when the hog goes into the cooler. In other words, leaf fats and the cut fats that are taken off the hog prior to the point at which we take a dressed weight contribute to making up the fats that go into the lard. The fats that come off the cut — in other words, the fats that go into lard that come off the — what?

Q. Cooler weight, let's say.

A. After the point at which the hog is weighed going into the cooler, they are credited to fresh pork, since they were included in fresh pork.

HADELER (Cross)

(583)

Q. Now that shrinkage at 4800 pounds could come from any of three reasons; first, theft; second, additional shrinkage not allowed; third, errors in computation of figures on

transfer, taking inventory, or any other error, those three things are the reason for that shrinkage; is that correct?

A. I would say that is correct. However, we haven't used one single week. We have taken a series of weeks; in doing so we eliminate certain of those errors you have reference to.

* * *

(624)

Q. And you don't know that any inventory figures in any of these weekly sheets are correct, do you?

A. I don't know that they are not correct either. And as for the intervening inventories, all through the period, we have made the point, I hope, it makes no difference whether those inventories are correct, or not correct. They all wash out, the beginning and the ending.

* * *

(625-6)

Q. I beg your pardon. I thought I understood you to say that.

A. I said we tabulated our exhibit here from the copies of the work sheets. We were in there off and on during the year. We knew they had been making these up as a regular matter of course. They were using them in their operations at all times. We had no reason to think they were not accurate all the way through, as accurate as they could make them.

Q. And you had no reason to think they were accurate either, did you?

A. Except in general. We never find too many adjustments to make out at Suchers. So we presume that basically it is accurate.

(626)

Q. You and I have trouble getting the same place. I

want to know, did you have any reason to believe that these inventory figures were either accurate or inaccurate, either one?

A. All I can say is, from our general experience out there, basically their records are accurate, the ones we have checked. For what reason should I think this is inaccurate?

FRANCIS MERICA — Direct

(672) Q. Mr. Merica, what item, if any, did you find on your further check.

MR. SELVA: We object.

THE COURT: I believe you told me you found one item.

THE WITNESS: One item. There had been several delivered there, but there was only one —

THE COURT: Just state what you found yourself.

THE WITNESS: I found one fresh ham that had been roasted.

THE COURT: Where?

THE WITNESS: On McCall Avenue, right across from the Classic Gardens, at a bar, janitor's house that worked at Classic Gardens.

* * *

McCONKEY (Cross)

(684)

Q. Mr. McConkey, did I understand you to say that these little scraps that would adhere to the knife and that would drop on the floor would be about ¼ of one percent of the hog?

A. I hardly think it would be that much, sir.

(685)

Q. I thought it was what you testified to just a moment ago: It would be a very small amount, about ¼ of one percent of the hog killed.

A. I believe I said it would be less than a quarter of one percent.

Q. Less than a quarter of one percent?

A. Yes, sir.

* * *

(686)

Q. If you didn't, I stand corrected. When did you first decide that the cooler shrink would be 1½ percent as you testified?

A. I think I said 1½ to 2.

Q. When did you first decide that cooler shrink would be 1½ to 2 percent?

A. I have seen many tests; made them myself.

Q. Did you determine that after talking to Mr. Goldman about this case?

A. No, sir.

Q. Or Mr. Smith, about this case?

A. No, sir. I have known that a long time.

* * *

(693)

Q. And you had no reasons to suspect that any great quantity of meat was being taken from this plant before the day of Harris's apprehension?

A. I said I was told, —

Q. I am not asking you what you were told. I am asking you what you observed.

MR. GOLDMAN: The question was "You had no reason to suspect." He is answering the question asked.

MR. SELVA: All right. Go ahead and answer it.

A. (Continued) I was told by my superiors that our inventory figures showed that there were some losses.

* * *

(702)

Q. Had you, as plant superintendent, made any test to determine cooler shrink, or cutting shrink, as they existed at the Sucher Packing Company?

A. I have made some for my own information on groups of hogs that we were shipping out, checking weights in and out for that purpose, for my own information.

* * *

(703) Q. Can you tell me when you made those tests of the cooler shrink of the whole carcass of the hog?

A. When?

Q. Yes, sir.

A. Well, it was during the time we were shipping dressed hogs, four or five years ago. I couldn't give you a date.

* * *

(706) Q. Can you tell me when a vat is not full, the weight of that vat is estimated?

A. No, sir.

Q. How is that weight determined in the vat that is not full?

A. The hams are weighed before they go to the vat. They are weighed in this truck and they are removed from the truck and go over a table where they are processed in our (707) curing process and then they are taken and put in the vat.

* * *

(708) Q. You want to tell the Court and jury that in no instance that you know of, that no more than one ham would be added or taken away from a complete vat?

A. I don't know of it ever happening.

Q. Could be one or two hams, couldn't it, in a hundred hams?

A. I see no reason for it to happen.

Q. Would it be?

A. I have never known it to happen. . .

* * *

(708)

Q. Can you tell me whether or not the operations, during the time you were there, are the same as they are today?

A. I would say they are in all operations — or what operations do you mean?

* * *

(708) Q. I am referring simply to the hog operations, which is the topic of controversy here. Would you say that the capacity of the killing room is the same today as it was in 1949?

A. Yes, sir.

Q. Would you say that the operation of the (709) cutting room would be the same today as it was in 1949?

A. Yes, sir.

* * *

(719)

Q. Mr. McConkey, have you ever run a test, yourself, to determine the amount of shrink in the ham during the time it is in the cooler room?

A. I have.

* * *

(719) Q. Are you acquainted with the weekly production analysis sheets?

A. I have some ideas of it. I am not familiar with it because I don't get a copy of it.

* * *

(719) Q. What personnel in those departments obtained the weight and turned these calculations over to their supervisor?

A. There would be a daily report. They would (720) turn it directly to the accounting department.

Q. That is, through you?

A. Not necessarily through me.

Q. Then you don't see all of the daily reports that might go to the accounting department?

A. I don't know what reports you are speaking of.

Q. I am speaking of weight or amount, if they count that, or any other reports which might indicate a running inventory.

A. That is a daily routine. Wouldn't necessarily go over my wesk. It would go right to the accounting department.

* * *

(723-724)

Q. Can you tell me whether you have ever observed any casings split and bursted?

A. I have.

Q. What is done with that sausage?

A. That sausage is reworked. The casing is removed and it is reground and worked in other products, sausage products.

* * *

(734-5)

Q. If a person miscuts on ham. or is careless and part of the cuts are dropped onto the floor, you would get a greater degree of cutting shrink in a cutting room?

A. If you dropped ham on the floor, or part of a ham, I certainly wouldn't throw it away. I would wash it and clean it up.

Q. I am speaking of cuttings that make up a cutting shrink.

A. Well, it depends on what it was. If it was a piece that — a large piece rather than just a small scrap, why, he would be allowed to wash that or trim it and save it.

Q. If there were small scraps then, of course, those would be disposed of?

A. Those would be swept up, probably go to inedible rendering.

* * *

Q. And, of course, when those breaks occur, that affects the product in the refrigerating rooms, does it not?

A. Well, it would be — I can't recall any serious trouble that we have had that would cause us any difficulty.

* * *

(736) Q. You don't know how long they broke down, or how extensive they were?

A. I know that we haven't had any extensive breakdowns.

* * *

REDIRECT

(741)

Q. Mr. McConkey, you testified concerning the refrigeration at the Sucher plant. Is there anything in those particular areas which are not refrigerated which would affect the shrink in the way the product is handled at Suchers?

A. None. The portions that are not refrigerated (742) have no bearing on this product because they are merely transported through these departments to other departments which do have adequate refrigeration.

Q. With reference to the the discussion concerning piece count, Mr. McConkey, were there inventories taken prior to the installation of the system of counting the actual pieces?

A. On the inventory?

Q. Yes.

A. There were because they were so situated it is a very easy matter to count them when they are hanging on trees or on racks.

Q. Prior to the time they made a record of the actual number of pieces, was there a record of the weight inventory?

A. The record of the weight was used.

MR. GOLDMAN: That is all.

RECROSS EXAMINATION

Q. The record of the count of pieces commenced sometime about the middle of 1950 when it was inaugurated, didn't it?

A. As far as I can remember any inventory of smoked meats, that is what we are referring to, that was a piece count also even though we didn't have a complete (743) overall count system of the pieces going through cure. But any inventory count in the smoked meat cooler, I am sure was always used and still is.

Q. But then you didn't have a count of the pieces going through cure, the fresh pork pieces, the loins and things of that character of fresh pork product, until you inaugurated the count system, as you say of about the middle of 1950; is that right?

(743)

A. As far as I know, we did have a count, inventory count, on this pork, also, on loins for inventory purposes, weekly inventory.

Q. Now, in addition to the smoked hams you now include a count on loins and a count on fresh pork; is that right?

A. For inventory purposes.

Q. So that what you told Mr. Greene, that you were just inaugurating the count system, was a mistake?

A. No, it was not a mistake. That was a little bit different.

Q. Were you inaugurating a count system at that time to attain accuracy?

A. On hams and bellies.

Q. You were inaugurating a count system to attain accuracy, weren't you?

A. We were.

(744) MR. SELVA: That is all.

RE-REDIRECT

Q. The hams and bellies that you mentioned, Mr. McConkey, what hams and bellies are you talking about; what state of the process?

A. Going in cure.

Q. Going in cure?

A. Yes, sir.

MR. GOLDMAN: That is all.

DAVIS — Cross

(762)

Q. And, therefore, their shrink could be higher or lower than the figures that you have submitted, couldn't they?

A. From my observation, going from cooler to cooler, department to department, I would say they net the average.

* * *

(765)

Q. Just what did you observe this morning at Sucher Packing Company in connection with their cooler room. let's say?

A. I was taken on a tour through the plant. I went in every cooler in the plant. I felt the products. I looked at the type of refrigeration that they had and also noticed if the product contained moisture on the outside or if the floors were damp in the cooler.

Q. What would the indication be if the floors were damp in the cooler?

A. That the room had quite a bit of humidity in it or dampness.

Q. Do you consider refrigeration as one of the pertinent factors in determining shrink?

A. To a certain point, yes.

* * *

(776)

Q. When you went through the plant, did you observe any packing rooms, rooms where they were packing sausage and sausage product?

A. Yes.

* * *

(777)

Q. Did you go down in the sausage cooler?

A. Yes, I was in the sausage cooler.

Q. Did you observe the product in the sausage cooler?

A. In the ground state, yes, and the trimmings, yes.

Q. I am speaking of sausage in casings.

A. Oh, excuse me.

Q. Did you go in that cooler?

A. Yes, I was in that cooler.

Q. What was the purpose?

A. To look at the finished product to see exactly how it was handled, the flow through the plant.

Q. Did you examine the finished product?

A. I felt some bolognas for firmness.

Q. Did you examine anything else in the cooler?

A. No.

Q. Then you don't know what the temperature was in that cooler.

A. Yes.

Q. You do?

A. Yes.

Q. How do you know what the temperature was?

A. I asked them about the temperature in that room.

Q. Wasn't there a thermometer in the room?

A. Yes.

Q. You didn't look at that?

A. No.

Q. You asked what they held the temperature at?

A. Yes.

* * *

(779)

Q. Did you go inside the smoked cooler where they cool the smoked products?

A. Smoked meats?

Q. Yes, sir.

A. Yes, I did.

Q. What did you check in that room?

A. I looked at the operations, saw how the product was hung in the room, and I also looked at the temperature in that room.

Q. You didn't ask them what they held the room temperature at?

A. Yes, I did. They said 50 degrees.

* * *

(782)

Q. That is spoilage?

A. It might be considered spoilage, because it would be used in the plant.

Q. An edible meat?

A. Yes.

Q. You would have to trim them down?

A. It might go into lard, if you have any trimmings.

* * *

(787)

Q. Would you say that packers who use humidifiers get a lower shrink?

A. Normally, humidifiers are used in some smokehouses to reduce the smoking shrinks. But normally, we don't put too many of them directly in the coolers. That is part of the refrigeration.

* * *

(799)

Q. Did you make any inquiry at the Sucher Packing Company whether or not any of those factors existed in 1948, 1949 and 1950?

A. To a certain extent.

Q. What extent?

A. I asked if the departments, present departments, were located in approximately the same positions in the plant as they were in the past, and he said "yes", and from my observation of the departments and the way the doors were being opened and closed, were normal operations and looking at the floors and the drains and everything and the moisture off the products, I formulated that most of the things you have on the paper were actually being controlled in that plant.

REDIRECT EXAMINATION

(806)

Q. Mr. Davis, in computing the normal shrink, does that shrink include an averaging factor for those variances that you have mentioned?

MR. SELVA: We object.

THE COURT: Overrule the objection.

MR. GOLDMAN: What is your answer?

A. I would say definitely yes. I mean the percentage that I set forth take into consideration the variations that he mentioned. Space, humidity, opening, and closing doors, or the temperature factors, or the other factors he mentioned.

Q. Mr. Davis, if hogs are close together, is there more or less shrink than if they are farther apart?

A. After the hog is once chilled to the proper temperature, then that makes no difference, they have less shrink when they are moved closed together.

Q. Does it make any difference in packing plants whether the passageways are refrigerated, if the various rooms where the product is held are refrigerated?

A. No, because actually, as I see it, the product is in transit to a cooler, and it is only a matter of minutes while it is in the warm area before it hits the cooler.

(807)

Q. And if the humidity in the cooler is proper, does the circulation of air by fan adversely affect the shrink?

MR. SELVA: Objection.

THE COURT: Overruled.

A. I would say no, because with fans and the proper humidity, you get better circulation in the cooler, and you apply more moisture back to the product again.

ELLIOT SACHS — Direct

(902) A. That is right, because the question I asked Mr. Solomon and others — no. It was Mr. Solomon at that time. Whether that condition and others which I had observed, were the same at that time as well as during the claim period.

Q. And what did he say as to whether or not the conditions you have described were the same when you saw them as they had been during 1948, 1949 and 1950?

A. As I recall, he said they were the same.

* * *

PROCEEDINGS

(915)

MR. GOLDMAN: Your Honor, earlier in the case defense counsel asked for information concerning dressed weights, dressed hog shipments. We have made somewhat of a search. It involves going through several hundred thousands of invoices and they came up with about 6 million pounds and I may say, if opposing counsel wish to send Mr. Sachs out or anyone else, to go through that tremendous amount of invoices, they may do so to dig up the rest of it. Here they are. Do you want to look at this, Mr. Pickrel?

MR. PICKREL: Not right now. Thank you.

* * *

(1124-5)

MR. GOLDMAN: Now, do you want those invoices? There are about six million pounds of dressed hogs that we fished out from among several hundred thousand invoices. You asked about dressed hogs the other day.

MR. PICKREL: May it please the Court, may I inquire as to whether or not counsel remember as far back as when this case started and when Mr. Smith was the first witness, and then is when we asked for them.

MR. GOLDMAN: I offered these the other day and Mr. Pickrel said he wasn't interested. Now, I am offering them again.

PROCEEDINGS

Legal Argument to the Court by Counsel for Plaintiff at Conclusion of all the Evidence

(4 Supp.) He (Harris) also testified that he observed other employees daily — every day some employees taking stauff for personal use; the fresh pork and sausage items; that they put it in their pockets. Mr. Harris didn't say in his testimony anything about capacious purses. That is what I said in my opening statement. That is one of the statements apparently we did not establish, a capacious purse. Mr. Harris said boxes (pockets).

We have the testimony there of Harris that about one-third of the employees were engaged in that pilfering. So, we have direct testimony. It is a very difficult thing to get direct testimony of theft. There were detectives hired, as the evidence shows. They were never able to catch anybody. The supervisors were not able to catch anybody. When Mr. McConkey was around, nobody would steal anything. Nobody was caught except for a couple of people Mr. Beerman caught when he was there for a while, maybe being a little more alert than most people and being a little more suspicious as to their conduct. Up until the time that Harris was caught redhanded with the trash truck, they didn't actually catch anybody other than (5) these examples of small, petty pilfering.

So that, there is definite direct evident from which one could make a rough estimate of how much had been stolen over a period of time. It would not be exact. It would be an approximation only. The law does not require that once it has been established with the requisite degree of certainty that damage has occurred, it does not require one to establish the amount of the damage with exactness. An approximation is sufficient.

* * *

Proceedings

(27 Supp.) And, I may say at this point, I think we are limited to a total of $120,000. I will make that concession because we have shown only five identified employees, plus unidentifiable employees, as a group who are involved in the theft. Under the terms of the bond we are entitled only to $20,000 maximum for each instance. And since the bond says "acting alone or in collusion with others", it is not our obligation to show how much each individual stole.

* * *

By the Court

* * *

(39 Supp.) So, the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff.

Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employees for there is no basis upon which such a determination could be made.

* * *

(42 Supp.) The exhibits, too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the matter of the inventory shortage should go to the jury.

Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury.

* * *

Excerpts from Legal Argument to the Court at the Close of the Evidence

* * *

(1134) MR. PICKREL: On behalf of the defendant, we ask the Court to prepare and submit to the jury a special

Excerpts from Legal Argument to the Court at Close of Evidence

verdict in which they shall be required to outline the dates on which the alleged wrongful acts of dishonesty occured. What, if any, of the three meat products involved in this case, were in any such dishonest acts, and the value of the same?

We ask this so that this Court may know upon what the jury based its opinion and finding.

* * *

(45 Supp.) MR. GOLDMAN: I would object to a special verdict of the character stated by Mr. Pickrel because it requires details beyond the requirements of the policy.

* * *

Excerpt from Closing Argument of Mr. Pickrel

(1173) Then they (1174) also say to you in addition to Willie Harris, whom we had arrested, and James Jackson, whom we had arrested, three other people are mentioned. They are just mentioned; Willie Harris mentions them; Helen Hurt. Well, now, he mentioned her, therefore, they want you to guess what Helen Hurt did. You wouldn't know Helen Hurt if she would walk through this room. I wouldn't either. They got her statement. We have never seen it. That is, you haven't seen it, but they got it. We know. We have seen it. Wanted them to put it in, but they didn't put it in.

They got Robert Maiden's statement. Haven't heard anything about that. Both live here in Dayton. They could have subpoenaed them and let them tell their dreadful tale, if they had a dreadful tale. But I guess they didn't have a dreadful tale.

United States Court of Appeals

For the Sixth Circuit

THE SUCHER PACKING CO.,
Appellant.

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Appellee.

SPECIAL REHEARING APPENDIX

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EXCERPTS FROM TRIAL MEMORANDUM OF PLAINTIFF

(1) It is the claim of the plaintiff that five known employes and a number of unknown employes have, through larceny, theft, wrongful abstraction, willful application, or other dishonest or fraudulent acts, acting alone or in collusion with others, taken meat products of the plaintiff, to plaintiff's loss in the amount prayed for in the Second Amended Complaint. It is the contention of the plaintiff that the loss was caused by the dishonest and fraudulent acts of the employes involved, and the amount of the loss is shown by the computation of the net so-called "excess shrinkage" computed from its weekly product analysis sheets for the 47-week period ending October 22, 1949 and the 45-week period ending September 11, 1950. The loss is, strictly speaking, not necessarily an inventory shortage. The loss is a disappearance of product from the plaintiff's premises, which, in the presentation of the evidence, the plaintiff measures by its records in the form of the weekly product analysis sheets and supporting data and other related records of the plaintiff company. It is true that if the product had not disappeared, it would have been in the plaintiff's inventory at one time or (2) another. The loss in this case is somewhat different from the ordinary inventory shortage type of claim where the shortage appears in the inventory alone and is so computed. As shown from the testimony of Mr. Hawk and Mr. Smith, already in the record, and as will also be shown by the testimony of Mr. Hadler, another certified public accountant, and other witnesses, while the weekly inventories are used in computation of excess shrinkage which represents the product which disappeared through dishonesty of employes, any errors in the intermediate inventories of either of the two periods involved are of no consequence at all, as they are self-correcting and cancel each other out, and the only errors in inventory

which could affect the computation for the total period of either of the two periods, would be the first and last inventories in the respective period, but, as further testified by Mr. Hawk, and as will be discussed by other and expert witnesses, in view of the tremendous flow of product through the plant during the periods in question, compared to the amount of the opening and closing inventories of the period, any errors in those inventories do not materially affect the computation of the total excess shrinkage for the entire period. The reason we mention these facts is to distinguish the present case from the case of the ordinary inventory shortage claim.

In the present case, although the insurance policy was effective November 1, 1947, for a three-year period, and although the plaintiff lost very large sums through the dishonesty of employes prior to the beginning of the 47-week period ending October 22, 1949, unfortunately the plaintiff does not have adequate records to support the amount of the loss prior to the (3) beginning of that 47-week period. Also, the plaintiff's record for the week intervening between October 22, 1949 and October 29, 1949, could not be located when plaintiff employed the auditors to make the computation of the excess shrinkage. Indeed, this one week's record can still not be located.

The auditors then also computed the excess shrinkage for the 48-week period ending September 30, 1950. The one ring of thieves, in which William Harris and James Jackson were involved, was apprehended on September 11, 1950, and while there probably were thefts by others after September 11, 1950, plaintiff has no direct evidence of such thefts and therefore is not claiming any loss after that date. Consequently, it has adjusted the claim in the Second Amended Complaint by subtracting 3/48 of the excess shrinkage of the 48-week period ending September 30, 1950,

the 3/48 representing the approximately three weeks between September 11, 1950 and September 30, 1950.

The auditors chose September 30, 1950 as the ending date for their computation of the second period, because, it being the end of the month, the figures could be more easily tied in with plaintiff's ledger and journal. Thus, in the present case, while under the terms of the policy the plaintiff would be entitled to claim losses beginning November 1, 1947, it has adequate records to establish those losses only for the 47-week period ending October 22, 1949, and for the 48-week period ending September 30, 1950 adjusted back to September 11, 1950.

In addition to the record information which establishes a disappearance of product which cannot be explained by any honest or business cause, the plaintiff in this case fortunately has direct evidence of theft. The witness, William Harris, who (4) was caught with a load of meat, stolen from the plaintiff's plant, concealed under rubbish in the trash truck of which he was the driver at the time, was convicted of grand larceny for stealing from the plaintiff. James Jackson also pleaded guilty and was convicted of grand larceny in connection with theft from the plaintiff. William Harris, having served his sentence, apparently is willing to make a clean breast of the entire matter, and he testified that he had worked at the Sucher Packing Co. fairly steadily, but not continuously, from 1948 until the time he was apprehended, and that he worked first as a laborer around the plant, and for the last three weeks as driver of the trash truck; that for a period of two years, at the instigation of Jackson, he and Jackson and Robert Maiden and Helen Hurt, other employes of the plaintiff, were engaged in almost daily stealing from the Sucher Packing Co. by loading up trash barrels with various fresh and smoked pork products, concealing them under trash and having them hauled

away on the trash trucks, thereafter selling them to various persons. Harris testified that from 4 to 5, to 8 to 10 barrels of meat per day were hauled away in that manner; that his share of the proceeds, when he helped load the products, was $15.00 to $18.00 per day, and when he was driver, from $50.00 to $70.00 per day. He testified that the employe, Willie Early, was involved in the ring for only a short period; that there were taken up to a dozen hams per barrel, and from 18 to 20 sides of bacon per barrel. He also testified that other employes of the Sucher Packing Co. were stealing daily, small quantities of meat, each, for personal use, consisting of fresh pork or sausage, and he estimated that almost a third of the employes were engaged in such thefts. This testimony would account for far (5) more of the disappearance of meat from the Sucher plant than plaintiff is claiming in this case. Actually, in plaintiff's computation of excess shrinkage, the figures are very conservative, as plaintiff made an extra allowance for normal shrinkage which was more than actual experience required, in order to be sure that the claim could not justifiably be criticized.

(Here follows citations and discussion of cases.)

* * *

"(9) In the foregoing citations, we have included those in which the interpretation of the use of the word "conclusive" or "conclusively" is used in a policy to describe the proof required, as the defendant will probably claim in the present case that plaintiff is claiming an inventory shortage. As pointed out above, actually plaintiff is not claiming an inventory shortage as such, but is using its records simply to establish the amount of loss caused by theft and dishonesty of its employes, of which there is direct evidence in the record. In any event, as shown by the cases, even if this

were a claim of an inventory shortage, the word "conclusive" must be given a reasonable construction.

Also, the cases cited show that the plaintiff in this case has a much stronger case than can usually be found where a claimant seeks to recover for losses arising out of disappearance of property claimed to be due to dishonesty of employes.

SUPPLEMENTAL TRIAL MEMORANDUM ON SUBJECT OF AMOUNT OF DAMAGES

(1) As indicated in plaintiff's original trial memorandum, plaintiff does not necessarily rely on the summary of the excess shrinkage and the loss in money by reason thereof, taken from the weekly product analysis sheets as shown on Mr. Hadler's computation (plaintiff's Exhibit 6, as modified by plaintiff's exhibits 21 and 22), but the book records and computation summarized on those exhibits, backed up by the product analysis sheets and the file of documents for each week in support thereof were offered rather as corroborating evidence of the direct testimony of theft given by William Harris.

Harris testified that beginning sometime in 1948 he became connected with the ring which was then already in operation, the other members of the ring at the time being Jackson, Maiden and Hurt; that this ring, through the loading of meat into barrels, which were then placed in trash trucks and thus removed from the premises, stole from 4 to 8 barrels of meat a day almost every day; and that for a short period before the ring was caught, a fifth employe, Willie Early, joined the ring. Harris testified that the ring stole fresh and smoked pork, consisting of shoulders, bacons and hams. He also stated that in addition to thefts by the ring, there was fresh pork, smoked pork and sausage stolen

by other employes of the company for personal use, by placing the same in their pockets; that such was a daily occurrence; and (2) that almost one-third of the other employes were involved in that type of pilferage for personal use. Harris also testified that in the barrels taken out, there would be from 5 to 10 hams, depending on the size, and from 20 to 25 sides of bacon; and as to shoulders, one could easily estimate the equivalent quantity of shoulders. From the estimated weights of such quantities of meat given by Mr. Smith in his testimony, one could compute the approximate amount of meat stolen by the ring during the period in question; and from the average wholesale sales price which was the value of the property stolen, the jury could then arrive at a figure for the amount of the loss due to the activities of the ring, without any other testimony.

It is evident that under Harris' testimony, proof that loss did occur is definite and certain, the amount of the loss, from his testimony alone, being the only matter that is not certain. However, under the law, hereinafter cited, all that the jury need have is some basis for reasonable inference as to the extent of the damage. The amount of loss need not be proved with certainty or exactitude.

Accordingly, in the present case, the Hadler computations and the weekly analysis sheets with supporting data are submitted to the jury, not necessarily for the purpose of proving that the loss occurred, because that had already been proved by Harris' testimony, but for providing the jury with information which they may choose to use, or not, as they see fit, and only to such an extent as they may see fit, as assistance to them in arriving at the amount of loss. If the plaintiff's witnesses are to be believed (and plaintiff has a right to assume that the jury will believe them) there is nothing indefinite or uncertain about the loss as shown by the computations.

Supplemental Trial Memorandum on Subject of Amount of Damages

Plaintiff's witnesses stated that while the question of so-called normal shrinkage is subject to some variation, the total (3) of 3½% allowed by the plaintiff for fresh pork and the other percentages for smoked pork and sausage are outside maximum figures, beyond which any variation would not go, and that actually the normal shrinks were less than the percentages allowed. For example, the plaintiff's witnesses have testified that 3% for fresh pork is more than enough to take care of normal shrink from hot weight to sale, including the initial chill shrink, any cutting shrink, and any shrink thereafter before sale, but that, to be conservative, and so that the defendant could not reasonably object to the amount, an additional half-percent was allowed for purposes of the claim. Similarly, with respect to the normal shrinkage figures given for the other items in the claim. The Court will recall that according to the testimony of Mr. Davis, plaintiff's outside expert, the amount of normal shrink allowed by plaintiff for sausage in the various categories was approximately double that used and found to be accurate in the industry. In light of this testimony, any variations that might occur in normal shrink cannot affect the amount of plaintiff's claim, as the amounts allowed were beyond the maximum of such variations.

The defendant spent a great deal of time in cross-examination, to show that intervening inventories may not have been accurate, and that even the opening and closing inventories of one period and the closing inventory of the other period may not have been accurate; and has also attempted to show that some of the transfers to cure were approximations only, and subject to possible error.

Plaintiff's witnesses, however, have stated, and it is a matter of mathematical certainty, that any errors in intervening inventories are completely washed out and make no difference whatever to the final result; also that, while pos-

sible errors in opening and closing inventories would affect the final result, in the light of the comparative insignificance of those inventories when compared to the total product going through the plant during (4) the periods, any possible errors in those inventories would likewise be insignificant in their effect on the computation of the total loss.

Also, plaintiff's witnesses have testified that the figures on transfers to cure, although sometimes given in round numbers, are nevertheless accurate; that the round numbers, for the most part, represent variations of 5 pounds or less, and that in practice there are just as many overs as unders, so that those slight variations balance out. After all, the plaintiff's witnesses, as experienced people in the industry, have a right to give the jury the benefit of their experience and their judgments and estimates of the accuracy of the method used.

It is true, the jury is not obligated to accept their testimony, and may, instead, accept the defendant's arguments that the figures are unreliable. However, the jury certainly is not obligated to accept the defendant's arguments, but may, instead, choose to believe the plaintiff's witnesses. Under these circumstances, if the jury believes the plaintiff's witnesses, the computations are not uncertain or inaccurate, but are definite, certain and accurate, and any margin of error affecting the total result is so insignificant as to be inconsequential; that, indeed, if there is any error in the computation, it is on the side of conservatism because of the over-generous percentages allowed for normal shrinkage.

Be that as it may, the claimed weaknesses in the methods used by the plaintiff have been called to the jury's attention, and the jury may, if it is so minded, choose to give greater effect to those alleged weaknesses than the plaintiff's witnesses say should be given; but the final conclusion as to

how reliable the methods are is for the jury to determine. This does not involve speculation on the part of the jury at all. It involves reasoned inferences on their part from the testimony. The testimony of the (5) plaintiff's witnesses has been definite and certain. The defense has brought out what it claims to be possible weaknesses in the plaintiff's system. The jury will have to consider the conflicting claims with respect to the reliability of the system, and come to its own conclusions with respect thereto.

It is also claimed by the defense that the excess shrinkages and resultant loss figures have three possible explanations:

(1) An understatement of the normal shrinkage factors;
(2) Errors in the figures;
(3) Theft.

1. We have already disposed of the claim of the possible understatement of the shrinkage factors. According to the plaintiff's witnesses, more than the maximum amount of normal shrinkages that could have occurred have been allowed for purposes of the claim.

2. While the defendant claims that there may have been errors by reason of the number of employes involved in gathering the figures together and making up the final result, there has been no showing that any errors were made on their part, and when any figures are audited, there is no margin for error allowed. Where money is figured, it must come out to the penny, and until the contrary is shown, plaintiff has a right to assert that all figures were entered correctly and copied correctly. Indeed, the testimony of Mr. Solomon is that whenever any large shrinkage figure occurred, everything was rechecked, and if there were any errors, they were corrected. Both he and Mr. Sm[illegible] testified that the figures as presented were correct. Mr. Hadler testified that although he did not audit the figures, he and

his firm had checked the system and occasionally checked the analysis sheets as part of their regular auditing consulting service, and that he had no reason to believe that the figures were not correct. Consequently, the jury has the right to believe the plaintiff's witnesses, that the figures are correct, and so far there has been no showing that the figures are incorrect in any manner.

(6) 3. Consequently, this leaves only the third possible explanation, to-wit, *theft*.

However, as stated earlier, we do not rely on the figures to prove the fact of theft, even though we would be justified in so doing. In this case we have direct evidence of theft by one of the criminal participants therein, and, therefore, do not need the figures to prove the fact of the theft, even though we would be justified in so doing, if necessary. The figures are simply submitted so as to help the jury if they wish to use the figures, and if they believe the plaintiff's witnesses, in arriving at what they believe to be the amount of the plaintiff's loss from theft.

Even if the figures submitted by the plaintiff would be considered as being somewhat uncertain (which we contend is not the case, if plaintiff's witnesses are to be believed), even under those circumstances such fact would not affect the plaintiff's right to have the figures considered by the jury.

A distinction is made in the law between the character of the proof required to prove that damage has occurred, and that required to establish the amount of damage. The rule that one may not recover remote, uncertain or speculative damages, has to do with the character of the proof that damage did occur. If a party can prove with a reasonable degree of certainty that damage did occur, all that the jury then needs is some basis from which reasonable

inferences may be drawn as to the amount of damage, even though the proof offered is uncertain as to amount.

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, the famous "portal to portal" pay case, there were no records to prove the amount of time involved by the employe in his portal to portal activities. The Court said, at page 688:

> " * * * the employer having received the benefit of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. (7) Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damages is itself uncertain, but here we are assuming that the employe has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain." (In the case at bar we have proved through the testimony of Harris that the thefts have occurred) "The uncertainty lies only in the amount of damages * * *. It is enough, under these circumstances, if there is a basis for a reasonable inference as to the extent of the damages."

In the case at bar, if one were to add up the average of barrels per day which Harris says were stolen, for the period of time until he was caught, and multiply that by the amounts and the value thereof, it is easy to see that one would come out with a much larger figure than plaintiff is claiming, even without allowing anything for the pilfering for personal use which Harris said was also a daily occurrence, and in which approximately one-third of all the employes participated. The computation which plaintiff has offered from the product analysis sheets, simply furnishes corroborating data which the jury, depending on how much credit they give to plaintiff's witnesses, can use as a

basis for making a reasonable inference as to the extent of the damage.

(Here follows citation and discussion of many cases.)

* * *

(12) In the case at bar, the defendant, by its policy, in effect agreed to indemnify the plaintiff against loss within the limits of the policy caused to the plaintiff through the theft, etc., or other dishonesty of its employes. There is nothing in the policy that requires the insured to be able to identify by number of pieces or other specific identification, the actual pieces of meat that were stolen or wrongfully abstracted or misappropriated. There is no such requirement in the policy. The policy in Insuring Agreement I, agrees to indemnify the plaintiff "for all loss sustained during the policy period * * * through larceny, theft, embezzlement, forgery, misappropriations, wrongful abstraction, willful misapplication, or other dishonest or fraudulent act or acts committed anywhere by any of the Employes acting alone or in collusion with others, including loss of money and securities and other property through any such act or acts of any of the Employes * * * ".

The testimony of William Harris establishes that the plaintiff did suffer loss through the larceny, theft, misappropriation, wrongful abstraction, willful misapplication of its property by Harris and three of the other members of the ring in substantial quantities almost every day for almost two years, during which Harris was a member of the ring and for a shorter period involving the fifth member. Each member of the ring, under the terms of the policy, since he acted in collusion with others, was covered to the full extent of $20,000.00, or to the extent of $100,000.00 in all, if the loss was that great, and in addition thereto, the unidentifiable employes who daily pilfered for

personal use were covered to the full limit of the coverage of (13) unidentifiable employes in the amount of $20,000.00. This assumes, of course, that the jury will find that the total loss to plaintiff from the dishonesty of the identified and the unidentifiable employes was at least $120,000.00 To the extent that the jury may not accept the testimony of plaintiff's witnesses at face value, and to the extent that the jury may give little weight to the plaintiff's evidence, the jury may find the loss less than $120,000.00.

However, from the long list of cases above cited, the doctrine is firmly established that even if it be considered that the production analysis sheets and the computations made therefrom, contrary to the assertions of plaintiff's witnesses, do involve uncertainties, such possible uncertainties do not deprive the plaintiff of the right to have such evidence considered by the jury as an aid, to the extent that the jury wishes to use the same to determine the amount of plaintiff's loss, since the fact of plaintiff's loss has been established by the direct evidence from William Harris. The weight to be given the testimony and evidence offered by plaintiff's witnesses, of course, is for the jury to determine.

Excerpt from Original Transcript

(843) MR. GOLDMAN: Since the jury has retired, your Honor requested me to furnish authority on the subject of Merica's statement, that Jackson told him he had been stealing from the Sucher Packing Company for five years, as a declaration against interest. I have written down the cases and given them to your Honor's law clerk. I met him over in the law library and he brought some books over with him. I can present that at this time, if your Honor wishes.

* * * *

Excerpt from Original Transcript

(844) THE COURT: That is the statement you would have Mr. Merica testify that Mr. Jackson said to him that he had been stealing from the Sucher Packing Company for five years?

MR. GOLDMAN: Yes, your Honor. Shall I proceed (845) on the law?

* * * *

SECOND SUPPLEMENTAL TRANSCRIPT

Colloquy Between Court and Counsel and Argument of Plaintiff's Counsel

* * * *

(3) THE COURT: Do you have a case to the effect that the declaration of a witness other than the party may be given as adverse?

MR. GOLDMAN: If it affects his pecuniary interest?

THE COURT: Well, a case, do you have one?

MR. GOLDMAN: Well, I think —

THE COURT: The text of Ohio Jurisprudence is no law.

MR. GOLDMAN. I grant you that.

THE COURT: Unless it is backed up by a decision.

MR. GOLDMAN: I think what I had better do, since I don't have much time and I didn't have a library available to me last evening, my statement was made, you know, on my conception of what the law is on the declarations against interest. When we get out of court, the Law Library is closed. I know it to be the law. I am sure cases can be found that say declarations against persons, pecuniary, when made, may be used as exception to the hearsay rule. Under the old law it used to be if he were dead or unavailable.

The Ohio Jurisprudence says while it may have been. In that case it was a party. Apparently they have abandoned that condition. (4) But I submit even if the old rule were still the law, that is, if the declarant had to be either dead or unavailable, when a man pleads the Fifth Amendment he is unavailable as a witness, you can't make him testify.

THE COURT: Give me what you have in the way of decisions.

MR. GOLDMAN: On the subject that a person making a decision against interest may be used under the hearsay rule?

THE COURT: I don't mean that, but what I mean is a case that holds that it is an exception to the hearsay rule to permit someone to testify what a witness said is contrary to his —

MR. GOLDMAN: Proprietary interest?

THE COURT: Well—

MR. GOLDMAN: That is what the rule used to be. It had to be against his proprietary interest.

THE COURT: I know that is true with reference to a party.

MR. GOLDMAN: I am confident I can get your Honor a number of cases that will say that the witness has to be unavailable himself, out of the jurisdiction or deceased, and I see in this case where a man claims the Fifth Amendment it is just as good.

* * * *

(9) MR. GOLDMAN: Yes, your Honor. Shall I proceed on the law?

In the case of Citizens National Bank — I may say the basis for the admission is, this is a declaration against interest on the part of Mr. Jackson and as such is admissible because he is unavailable as a witness, in view of his claim-

ing the Fifth Amendment, just as if he wasn't here. And even though he was not a party, a declaration against interest may be used particularly a pecuniary interest.

In the case of Citizens National Bank vs. Santa Rita Hotel Co., 22 Fed. (2nd) 524, there was a suit by a bank against a hotel company with reference to some stock that had been pledged to the bank. The bank wanted it transferred to the bank after it was foreclosed on the pledge. The hotel company claimed that the stock was invalid as a forgery and produced testimony that at an earlier period a person who had been secretary of the corporation for which the stock had supposedly been issued admitted having forged the certificates or declared he had forged the certificates.

The circuit court of appeals held it was properly admitted, that even though the secretary was not a party to the case, the secretary was dead at the time, he was unavail- (10) able, that this declaration was against the interest of the secretary because it subjected him to civil liability and also criminal liability. It is a case almost exactly like the situation here.

In addition there are two cases, (Sutter vs. Easterly, name omitted by Court Reporter) 354 Mo. 282 and 189 S. W. (2d) 284. That was an actual Fifth Amendment case just like this one. In that case there was a suit to set aside a judgment on the ground it was procuring a verdict, because the attorney for the prevailing party had procured perjured testimony.

During the course of the suit they produced the statement that had been given by the witness in the trial of the case on the merits wherein he declared that his testimony was perjurious. He did not see the accident and that he hatched it up with the lawyer. It was objected to on the ground it was hearsay and the witness was called to

testify in the trial and refused to testify on the ground it might incriminate him, a Fifth Amendment case.

The court said the testimony was properly admissible, that the statement made outside of court to a third party on the ground it was a declaration against his interest, very much so, because it would have subjected him to financial — the court said it was not necessary to discuss his pecuniary discharge but certainly would subject him to something more serious that that, and the basis of the exception (11) to the hearsay rule is that no one will make a declaration against his own pecuniary or in this case interest of liberty and make it false, that therefore it is an exception to the hearsay rule.

The third case, Weber v. Chicago Ry. Co., 175 Ia. 358, 151 N.W. 852, was again a similar case. A railroad was sued because of an accident and it attempted to defend by introducing a statement of a person who admitted he caused the wreck. During the pendency of the case the individual had been convicted of wrecking the train, similar to Jackson here, who was convicted. Subsequently, however, the conviction was set aside on the grounds of insanity. A while before he was declared insane he was released from prison and they attempted to take his deposition and he refused to testify on constitutional grounds. After he was released to an insane hospital, he then was released as being harmless and could not be found at the time of the trial, but his deposition, such as it was, which constituted a refusal to answer was available, and the court there also said that his statement made outside of court, his declaration to third parties, was admissible in evidence because it was very much against his interest, pecuniary as well as interest of his liberty.

Then the case of Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18, 91 N.W. 28, the owner of a building sued the

owner of an adjacent building for having been responsible for fire to his (12) building. The contention was that the building next door caught fire and spread to the plaintiff's building causing it to burn down. The defendant attempted to produce evidence that a man in charge—happened to be meat there, too — had told someone that he had left the kitchen when the fire next door started and some kind of kettle boiled over which set the kitchen on fire, it spread to the rest of the building and burned down.

This testimony had been excluded by the lower court and the upper court held it should have been admitted because the admission of this, at least negligence on the part of the person was against his own pecuniary interest, he would have been subject to civil liability for his own negligence. He was not a party to the case; he was also unavailable as a witness at the time of the trial. I think he died.

In the case of Carpenter v. Carpenter, 153 Oregon 584, 56 Pacific (2nd) 305, a declaration of a party who was unavailable, who was alleged to have been the donor of certain property, the question was as to ownership and the declaration of donor showing he had made the gift and therefore no longer owned the property himself was held to be against his pecuniary interest and though not a party to the litigation was admissible as an exception to the hearsay rule.

In another case in Minnesota, in re Forsythe, 221 (13) Minn. 303, 22 N.W. (2nd) 19, a legatee under a will had made statements in derogation of the validity of the will, although he was not party to a subsequent suit involving the validity of the will, in the meantime died, his declaration was admitted as an exception, made outside of court, was admitted as an exception to the hearsay rule on the ground it was obviously against his pecuniary interest to

make a declaration which would invalidate what he might get and the court in that case said at page 54, — I am sorry, I don't have it. No. The case quotes Thayer on Evidence, at page 54, to this effect "The declarations made by a person (continues to quote to this point:) — where it appears they were against his pecuniary interest."

Finally the case of (Truelsch v. Northwestern Mutual Life Ins. Co. et al., name omitted by Court Reporter) 186 Wis. 239, 202 N.W. 352, where the question of the truth of certain statements made under a policy were brought into being and the party, the person making the statement not a party to the suit and involved a statement against his own financial interest, and the court held there again that that declaration, although made outside of court, against his pecuniary interest was admissible as an exception to the hearsay rule. He was unavailable as a witness.

I submit, therefore, that under these authorities since the declaration made by Jackson was not only against his own pecuniary interest, because he would be civilly liable (14) for his theft, but was also here even more likely to be true because under the theory of that exception to the hearsay rule, because no one is going to admit guilt of a crime, unless it is really true. Under these authorities, some of which are exactly in point and others are analagous, I submit the testimony should be admissible.

(In the transcript the court reporter did not always get the name of the cases cited in the foregoing argument.)

* * * *

(16) (The following is the argument of Mr. Goldman on motion to dismiss, which was omitted at the top of p. 846 of the transcript.)

MR. GOLDMAN: May it please the Court, at the outset I may say that I do not think opposing counsel have it within their power to plead our case for us. Our case is pleaded by the pleadings.

Argument of Plaintiff's Counsel at End of Plaintiff's Case

In the second amended complaint, in the original complaint, in the first amended complaint there was no reference to any inventory shortage, no reference to that being the basis of the claim, as such.

The second amended complaint complains that through the dishonesty, or it says, (Reads from second amended complaint) which is broken down into three categories, so much for fresh pork, so much for smoked pork and so much for sausage.

Now, it is our contention —

THE COURT: The opening of the paragraph from which you were reading "and including part of any inventory shortage".

MR. GOLDMAN: We are not claiming necessarily it would be an inventory shortage. That is the paragraph that states what the policy covers, the paragraph that simply states the policy covers. It is the paragraph beginning at the bottom of the page. The paragraph to which (17) your Honor has referred simply gives the contents of the policy.

THE COURT: Aren't you attempting to establish your loss by an inventory shortage?

MR. GOLDMAN: Not quite, your Honor. The theory of our case is this: We have direct evidence of theft. Now it is true that opposing counsel make light of Harris, his testimony. Naturally they would, because it hurts them. Harris testified that he worked for the Sucher Packing Company for a period, not every day—he didn't say he worked every day—for a period of several years prior to September 11, 1950 and beginning sometime in 1948. At the instigation of Jackson he began his participation in this thieving ring. Up until the time he was a driver, and he drove for the last several weeks of his employment, prior to that he was a laborer in and around the plant.

His testimony was that prior to that time what he did was help load barrels and fill them—top them off with trash and put them on the trash truck. He said this occurred almost every day; that he and Jackson and Maiden and Hurt were involved in it from the beginning, beginning in 1948; that Willie Early was only involved for a shorter period prior to the time they were caught. We have no record that Early worked there more than a short period.

It is true that Jackson's employment as what would (18) be called a regular employee, did not begin until July, 1950. Prior to that he was a day laborer. Mr. McConkey said he was working when he came as a day laborer. We were able to find one time card. He worked there at least in May of 1950, maybe earlier. McConkey said he was there when he came there in 1949. Harris' statement was that he worked there at least some time prior to the beginning of these thefts which he was connected with in 1948.

Now, in his confession which he was shown by Mr. Selva says, on September 11th he said he had been working there for three years. So, there is nothing inconsistent with the statements all along, and in his confession he was only interrogated concerning what had happened in the last three weeks when he was a driver.

Mr. Merica tells me when you want to get a confession, you try to get the man to put in writing something that will definitely assure you of a conviction. Of course, my knowledge of what Harris would say was based originally on what Mr. Merica told me. I confess there is some doubt in my mind whether he would testify, I didn't know; hoping he would.

Of course, in the case of Jackson, he refused to testify, although he had admitted. There again he admitted to Mr. Merica. — Of course, your Honor hasn't ruled on that fin-

ally—he had been stealing for five years. It shows (19) he was employed there for five years from the time the plant reopened in 1945.

Also, Harris' testimony was that they took anywhere from four to eight barrels a day and in the barrels they would have from—depending on the weights—hams from six to ten and from twenty to twenty-five bacons, and they also took shoulder butts, and the value of those is shown from the average prices for the same as appears on the exhibits. And actually we would not need to show the computations of excess shrinkage in this case to present to the jury sufficient for them to consider, to arrive at a verdict. They could take Harris' testimony and could compute and arrive at a figure of how much was taken and the value of it.

Now, Harris also said in addition to what part the ring took out that other employees, and he estimated that a third of the other employees were taking smaller amounts for personal use, sausage, chops and stuff of that sort, putting it in their pockets and leaving the plant with it. That is outside of the testimony of theft. That is not based on tickets; that is not based on speculation; that is not based on assumption; that is not based on inference. It is outside of evidence of theft.

This policy is supposed to protect the plaintiff and that is what it paid the premium for, dishonesty, and disappearance. Let us see those three cases.

(20) In the case of theft, there is nothing in the policy which says we have to say three hams, two shoulder butts; it doesn't say with what particularity we claim any particular items were stolen. Any amount which we could reasonably prove was stolen, we are entitled to recover the value of it, and we maintain that is the value of it.

* * * *

That is our contention that the jury, if we never put in Mr. Hadeler's sheets at all, if we didn't use the product analysis sheets at all, has enough evidence, except for the evidence of value, and Mr. Smith testified as to the approximate weights of the barrels, how many hams or bacons in it, so the jury would have a basis from which it could compute over a period of time an estimate of the amount of the loss.

(21) Now, the purpose of introducing the accounting testimony and the testimony of the product analysis sheets was for the purpose of assisting the jury in showing how much the loss really was.

It is true the jury doesn't have to believe Harris, although it is strange why a man—hard for me to conceive why anyone would take the witness stand and admit under oath he was involved in crimes for a period of several years for which he could be convicted and the only crime for which he was charged was the theft with which he was caught. The earlier thefts he wasn't charged. He ran the risk of conviction by his testimony. It is hard for me to believe that anyone would knowingly take the stand and under oath admit thefts for which he could go to prison again. It doesn't sound reasonable and I believe for that reason that his testimony is very credible.

They try to make fun of him, because it is true he is not a man of great intelligence. Perhaps if he were smart he would have claimed the Fifth Amendment too. Jackson is a little smarter. That is why he was no doubt the head of the ring, according to the testimony of Harris.

Although Jackson was convicted, the only reason he could have had for claiming the Fifth Amendment was he knew his conviction would not protect him for previous crimes for which he was not indicted. That is why he wouldn't (22) talk.

I submit that we have positive evidence, direct evidence, not inferences, but direct evidence of theft, and the approximate quantities of theft, that without any figures based on the product analysis sheets, there is ample evidence for the jury to arrive at a verdict.

Now, it is our contention that you see from the reading of the complaint that we have not claimed we are basing our claim on an inventory shortage. We cite the policy which includes that too. We said through larceny, theft, misappropriation, wrongful abstraction, other dishonest or fraudulent acts, of the employees, causing loss of property to the plaintiff.

THE COURT: How did you arrive at these amounts that you claim here?

MR. GOLDMAN: Well, I am saying your Honor, for the purpose of assisting, giving the jury some corroborating evidence of the amount, which they can disregard, if they wish, if they don't believe that the computations of Mr. Hadeler are reliable, they don't have to follow them.

THE COURT: If they accept the computations of Mr. Hadeler, that means they have accepted the inventory loss as a basis.

MR. GOLDMAN: Not necessarily. It may be and it could be actually that the amount of the theft is the same (23) as the inventory loss.

If Harris and his gang and individuals who stole, whom we could not identify, various employees taking stuff for personal use throughout the period, you couldn't identify them, – He said it was going on every day, almost a third of the employees were doing it – if we could total up the amounts they took, it should equal what is referred to as the inventory loss, or unexplained loss. Probably it is more because of the fact that we were over-generous in the allowance of so-called normal shrinkage. There shouldn't be

that much shrinkage, but to be on the conservative side we allowed more normal shrinkage for the purpose of computing the claim than ordinarily occurs.

So, actually, were we able now to go back and find every piece that was taken by this gang and by the unidentified group, they would probably total more than what is called unexplained loss. Naturally, as far as Mr. Hadeler is concerned, it was not up to him to subscribe the reason for the loss.

* * * *

(24) MR. GOLDMAN: So, it is our position that we used the figures simply as corroboration. Now, if we didn't have the figures, the jury would have to make their estimate as best they could, based on the direct evidence and arrive at the amount; figure out the average number of barrels a day, average weight, price and come up with a figure. However, I think that they are given great assistance by what I will refer to as Mr. Hadeler's computations, and I don't agree at all with the view that those figures are speculative.

Of course, if one doesn't believe the testimony of the plaintiff's witnesses, then they are speculative. But for the purposes of the plaintiff's point of view, it has the right to consider that the jury will believe the plaintiff's witnesses.

The attacks made on the product analysis sheets are that the intermediate and even opening and closing inventories may be inaccurate. There is testimony in the case and the jury has a right to believe it, and I think it is mathematically necessary that the intervening inventories make no difference whatever, the only inventories that have an effect on the total computation are the opening and closing inventories.

We have the testimony of Mr. Hawk, who has been a certified public accountant in practice since 1928, that

in view of the large volume of product which flowed through the (25) plant in those 47 and 48 week periods, that any conceivable error in inventory of the opening and closing inventory would become very minor and insignificant. It would affect it but it would be insignificant in the total result. As an expert he has given that opinion and the jury has a right to accept that.

There has been comment, derogatory comment that the product analysis sheet and the supporting data for the week ending October 29, 1949 is not here. It is missing. We would like to have it. It would certainly make our case a lot better, if we did. At least, it would take a lot of the steam out of the defendant's contentions, if we could produce that week's record, too, so as to have a complete period which ended on a fiscal year inventory. We can produce the fiscal year inventory by taking the beginning inventory of the week ending November 5th. However, that inventory would be used for the earlier period because we don't have the transfers for the week ending October 29, 1949. And that is the only reason we can't use the closing inventory. We have the closing inventory for that week because it is the same as the opening for the week that we do have. But we can't use the closing inventory because we don't have the transfers. So, we are left with having to use the closing inventory for the week of October 22nd.

Now, the jury has a right to believe, has to (26) believe that the intervening inventories make no difference because that is mathematical. I think we would be entitled to instruction by the Court that it is a mathematical certainty, no other answer is possible, as far as intermediate inventories are concerned, and as to the opening and closing the jury has a right to believe Mr. Hawk, believe our witnesses, any other witnesses, that any error in this would

have a very minor effect in the total outcome. It hasn't been shown there was an error in there.

As far as our witnesses have stated they have stated to the best of their knowledge the inventories are correct, but they do agree that the intermediate ones and any but the fiscal ones might be incorrect, because in some particulars they are based on estimates instead of actual weights. So I submit there is nothing to this point as to the inventories destroying the value of the computation.

A to the transfers the testimony has been by Mr. McConkey and Mr. Smith that this is not strictly guess work when they put them in the vats. They are designed to hold 1400 or 1500 or 1600. They are very large. Mr. Pickrel is right when he said they would have to be almost as big as that table. I think probably some of them are. They are weighed before that, but when the weight is such that they are one ham over or under, the amount that goes in, if it is 1405 or 1395, they round it off at 1400. If it is more (27) than that, they take a ham off. If it is less than that, they add a ham to it or a bacon, as the case may be. And after all, these people are very experienced in the business and Mr. Davis who has made analyses in many places, when he was asked about it, I believe he said these experienced people can tell, they become very good at it, in the grading of the hams and bacons as to the weight that is used for the purposes of the transfer.

Mr. Pickrel and Mr. Selva, of course, part of their job is to — at least I look at it that way — to throw dust in the jurymen's eyes, if I may quote from Gilbert and Sullivan. All that cross-examination was the purpose of muddying up the facts.

The grading of the hams and bacons into the various sizes has only to do with putting them in certain classifications, and it has nothing to do with establishing the weight

which is charged or credited to fresh pork and cure, when they go from fresh pork to cure, because after they are cured they are weighed.

So, the two kinds of weight, the curing weight—every ham is not cured. Men become experienced and know that a certain size is 10 to 12 or 12 to 14. But that is not the weight that is used for arriving at the figures. That is simply for the purpose of classifying them. Just by giving it a number – They could call it Joe or John, or (28) Class A and B. After they are graded, they are put into trucks and weighed and transferred from the trucks to the vats. They know how much to put in. These vats hold approximately fourteen, as the case may be. If the actual weight turns out to be a little over or under that which they have for the actual weights, they put in the round figure, and from experience they find the overs balance the unders.

Now, the jury does not have to believe that testimony, I grant you that. The jury could believe that they did the thing helter-skelter, didn't follow any accurate system. But the jury has a right to believe our witnesses. I think they are credible. I think the jury should believe them, and according to our witnesses, this is an accurate method.

Now, if the transfers are accurate, the statement also is that the purchases and the – They start off with the dressed weight, which is taken from actual scale tapes, not weight, and they subtract three percent of that in advance to take care of the shrink, or the normal shrink, and those weights are recorded.

Now, there is no presumption in law that clerks make errors, while, of course, it is possible, any record is subject to that possibility? but there has been no evidence that there were errors by the clerks in recording these weights or in recording any of the figures. If that (29) were the

case, every accounting firm, when they tried to balance books for a company would say, "Well, we will have to allow so much for error." We don't allow a penny for error. There is no assumption for error. It is not fair to assume there was error here. There may have been. Until it is shown, you can't assume that there was.

I submit the only error that was acknowledged as probable, in some cases they would come up with gains, undue gains. One thing I ought to bring to the Court's attention is that sometimes an apparent gain is not a real gain, because three percent, if it doesn't shrink that much, there will be an apparent gain, and from the testimony there might not be actually three percent in the shrink, so there should be every week after really a slight gain, assuming everybody was honest.

Mr. Hadeler did not testify that in his computation that the loss was caused by errors, by miscalculation, normal shrink or by theft. He said it could be if there were errors or if that was wrong, those could be guesses. But there has been no showing that there were errors. Until it is shown there were errors, no one has the right to assume there were.

As far as miscalculation of the normal shrink, there is no testimony that it was more than generous. We allow 3½ percent on the fresh pork. We allow 1½ on the smoked. Based on Mr. Davis' figures from being in the business seven (30) years and having examined balances and checked balances all over the country, his figures are less than our figures. On sausage particularly, where we allow five percent for certain classifications, he allows only 3½ or 2 percent. He says three percent is more than adequate to cover all shrinkages. They made actual tests at Suchers. This was not guess work. Now they try to make light of his statements on the basis "Where are the records?" There

is no point in keeping records. It is for their own information to know what the shrink is. A few months later makes another one to see if it is still the same and it has been the same. No occasion to keep a permanent record of it.

As to the shrinks in the other categories, the evidence is all one way. The percentage we allowed is more than adequate to cover what would occur through normal business practices.

Now they talk about the various things that could effect shrink, the humidity of the temperature. There is no evidence that they were not properly controlled in this case.

MR. SELVA: Is there any evidence at all in this case?

MR. GOLDMAN: Please don't interrupt. Of course, there was. The evidence was proffered as to the conditions (31) at Suchers with respect to shrink. I think your Honor ruled it out. I proffered the testimony of Mr. Smith on the subject that there was nothing in the manner in which the product was handled at Suchers that would cause any excess shrink.

The testimony of Mr. Smith is that the product went out in very short order. There was no evidence that the product stood longer than the normal period, which would cause any additional shrink.

Mr. Davis testified he took into account in giving his figures for shrinkage these various factors which average out. You have to take an average. On some animals you may have a much smaller shrink. That is your average shrink. When you figure the tremendous quantity of hogs processed at Suchers statistically there isn't any question that is the proper way to do it.

A lot of this talk by opposing counsel is simply surmise on their part; something they would like to be able to

prove and find. They would like to be able to prove that the temperatures were not right. There is no evidence that they were not. Our testimony is that they were, and the jury has a right to believe it. We take the view and I think your Honor will agree that the plaintiff has a right to expect that the jury will believe his witnesses – their witnesses' testimony, otherwise they would not have put them (32) on the stand, and from the point of view of this motion, it must be assumed that the jury will believe the testimony. And I say that even if we did not have this direct testimony of theft, we do have the evidence from our witnesses which explains every possible avenue where that product could have gone.

There is a complete accounting for it and the only remaining answer they say – They have eliminated the possibility of error by saying the error is not there. They have eliminated the possibility that the shrink without theft was greater than stated by saying it was not greater than stated, that the normal shrink was less than 3½ percent, and the only remaining possibility is dishonesty. Now, the jury has a right to conclude that.

I think in one case a fairly recent case, decided in our federal courts, Retail Stores vs. Hartford, 111 Fed. Supp., 772, an insurance company was sued on a similar policy there. In fact, the language in the policy was practically identical to the language in the present policy. And all they could show in that case was – they had no direct evidence of theft whatever – They showed that they came up in an inventory with a lot of merchandise missing. In that case they also had a shrink factor. They had an estimated shrink due to customer stealing. It was a retail store and they found from experience that customers shoplifted a (33) certain percent every year and by experience they knew pretty definitely how much that was and cer-

tainly as great a variable as shrink through evaporation and cutting should be, and they deducted the customer shrink, so to speak, from the total shrink and arrived at the loss. The evidence in the case even went beyond that as against the claim. A manager of the store left suddenly, but he was put on the stand and denied he had any connection with the theft. His evidence contradicted the theft. Nevertheless, the court found that from the accounting evidence that they had conclusively proved that the loss was occasioned by dishonesty.

Now I submit, if that case was correctly decided, then even without Harris' and Jackson's testimony, or Harris' and Merica's testimony, without any evidence of direct theft here we have established an equally good case because there there even is evidence there was no theft. There isn't any such evidence here.

Of course, actually this whole matter is on the motion which I would think would have to fall by the board because the defendant has admitted in their original answer in this case and has admitted in the letter which your Honor allowed in that there was dishonesty to a limited extent on the part of the employees. They have made an admission outright, said we have proved it in the letter.

Now that evidence the jury certainly can consider. (34) I don't see how they can get away from it under any circumstance. And actually when they complain now about taking cost figures as against price figures, those are the same figures they used in their letter. They acknowledged then that was a proper basis for fixing the value.

* * * *

(35) As your Honor has said, a notice before September 1950 was not necessary. When your Honor ruled out some of the proffered testimony on the subject of these

discussions with Mr. Macbeth, Mr. Pickrel has taken the computation and said they do not account for all the meat. That has nothing to do with this case. We are not claiming any loss on lard, any loss on cured products that haven't been smoked. We are not claiming loss of that kind. There is no point in confusing matters by putting that in. We have a complete accounting. The product analysis sheets give a complete account and they are in evidence. They give a complete accounting of what happened to all the fresh pork that was not stolen; give a complete accounting of all the smoked pork that was not stolen and give a complete accounting of all the sausage that was not stolen, and the jury can, if it chooses, check through every one of those sheets to be sure that they do.

Every type of transfer is covered. As Mr. McConkey said on the stand, in a packing plant they use everything but the squeal. That is true. They even recover the part washed off the floor in the cutting room, down the drain. The catch basin catches that and they put it in tankage. They (36) don't waste anything. There is complete accounting in a packing plant that doesn't leave there by dishonest means.

Mr. Beerman said they put in cash register machines. Mr. Smith was employed to set up a good product analysis so they could attempt to keep track of all the product, so they would know what has happening to it. The testimony of Mr. Hadeler is while he didn't specifically verify each one of these, he and his assistants have from time to time checked these and found they were accurate and properly accounted for everything in the disposition of the meat product.

I submit the jury has the right to believe all of that and, in fact, it is definitely true, they should not disbelieve it. Of course, I grant they have a right to disbelieve it if they see

fit. But on the assumption that it is true, they will believe it. There is no explanation other than dishonesty for the excess shrinkage.

And talk about what happened to lard or the other items, in their attempt to befuddle the issues, they are in the product analysis sheets. If we put them on our sheets, there really would be confusion.

It was complained when we took out beef and veal we should prepare another exhibit and we did. If we had lard a similar objection could be made.

Now as to the great to-do about the elimination of beef and veal, a party always has a right to eliminate (37) items which he thinks he may have difficulty in proving and we think we would have difficulty in proving the extent of the beef and veal loss. It is a fact that beef is hung in shrouds which makes the weight of the beef not as accurate as pork, because water gets in the shroud and that affects the opening weight. When I discussed that with the people and recognized that undoubtedly would be brought out, I figured rather than have a big to-do over that, the amount wasn't much, I decided to eliminate it from the case.

The deduction of the employees' cafeteria, the testimony was that no deduction was made of record, the only thing that was not accounted for. A generous estimate was given because at that time there were two-thirds as many employees as today. The amount that goes there is known today. Two-thirds of that was taken at that time. Even though it was not in operation over that whole period, on the assumption it was operating for the longer period, a credit was allowed for an estimate based on two-thirds of the amount that goes there today, at the highest price of the product at that time, to be sure that everything was on the maximum side, and nobody complained that the amount of the allowance was insufficient.

Argument of Plaintiff's Counsel at End of Plaintiff's Case

As to the last three weeks in September, there again it is a matter for the jury. If the jury thinks there should have been subtracted on the average for the three (38) weeks from the 48 week period, the paper figures that Mr. Selva asked me about this morning, they can do that, if they wish. Our testimony is that is the wrong way to do it based on the accounting methods. The jury doesn't have to go along with us, but there is nothing speculative about it. There is direct evidence that is the right way to do it. They could choose to believe it or not believe it, conclude that is what they will do or not do.

Mr. Pickrel was in error when he said you can't have identified and unidentified employees. There is nothing like that in the policy. The policy does eliminate the company's liability of $20,000 on identifiable employees, but it doesn't say you can't have both. According to the testimony of Harris, there is both kind of thieving going on, his ring plus the other names he didn't know.

* * * *

(40) I submit, therefore, as far as this case is concerned, first of all an admission of the defendant, there is no question but the case must go to the jury on that, regardless of Harris, regardless of any figures. Secondly, regardless of the figures produced on the basis of Harris' testimony, there is a jury question.

Now, I might point out to your Honor at this time even though possibly it won't affect the immediate motion, but there is a great distinction to be drawn between certainty with which the fact of damage must be proved and the certainty with which the amount of damage must be proved. The law is that you can't recover if the fact that you were damaged is uncertain, that is remote and speculative. But if the fact that you were damaged is proved, you

are not required to prove with the same degree of certainty as to the amount. In many cases the amount is very difficult and to some degree speculative. Every case involving loss of profits involves considerable speculation.

In a case involving condemnation where you get one real estate man gets on the stand and says it is worth (41) $20,000 and another one $50,000, what is the jury going to do? They don't have to believe either one. They pick a figure somewhere in between.

Where a man has pain and suffering, how much is that worth? There is no standard on which the jury has to go but they can give him damages without. Where a man claims a loss of permanent earning capacity that involves a great deal of contingencies. He may get better. His wages might go up in the future. Who knows? The jury still is entitled to arrive at what is in their view a reasonable amount.

What is it worth for a man to lose an arm?

THE COURT: I think that is not analagous.

MR. GOLDMAN: Well, I am saying, your Honor, the only reason I am pointing that out is, you have many cases where the ascertainment of the amount is much more indefinite. In fact, here in this case, our figures, if our witnesses are to be believed are not uncertain at all. It is only if you don't believe our witnesses that they become uncertain.

Now, the Supreme Court of the United States has passed on, not a case just like but on the general rule, a case somewhat analagous, the famous Wages and Hours case, 328 U. S. 680, where it was contended that this employee couldn't prove how much time was involved in portal to portal and what the value of his services were. He had no proof; it is all estimates on his part, and the Supreme (42) Court says at page 688, "Even where the lack of accurate records grows out of a bona fide mistake as to whether

certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain."

In the present case we have proved there has been theft and can estimate the amount through Harris' testimony.

"The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages."

Now, we say that certainly there is a basis for reasonable inference, the jury can draw. It will not have to accept our claims, but it can if they want to.

(43) There is another case in the Supreme Court, *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, where a man sued in an anti-trust violation attempted to show damage for loss of business, future profits, and that sort of stuff, the Supreme Court said: "Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the

extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The third case involving Palmer et al., Trustees v. Connecticut Ry. and Lighting Co., 311 U. S. 544, in which the Court says, "Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."

I submit, therefore, that the motion is not well (44) taken and that the matter should be submitted to the jury.

FIRST SUPPLEMENTAL TRANSCRIPT

Argument of Plaintiff's Counsel

(1) (The following was omitted at p. 1126 of the transcript in Case No. 1622, Sucher Packing v. Manufacturers Insurance.)

(Counsel for Defendant's arguments on motion to dismiss omitted.)

MR. GOLDMAN: Actually, I submit that opposing counsel's argument is really addressed more properly to the jury as to whether credibility lies and what inferences the jury should make from the facts.

To summarize our position, which I did before, it is our contention in this case this is not the usual type of case where a person is claiming, strictly speaking, inventory shortage and is introducing figures and letting it go at that.

Argument of Plaintiff's Counsel to Court at Close of All the Evidence

In this case, what we are contending is that there is direct evidence of theft.

The evidence on the part of Harris, which Mr. Selva makes light of, but which the jury is entitled to believe and which I don't see why they wouldn't believe, because of the fact it would be an amazing thing for a man to admit having committed crimes for which he could be prosecuted. After all, he was only convicted for what he was caught with, and it is amazing that a man would make such an admission, if it were not true.

* * * *

(3) So, we do have the definite evidence in the case from Harris that almost every day they put barrels on the truck and hauled it away. For three weeks he was the hauler. Earlier than that he was one of the loaders; that they hauled out anywhere from four to eight barrels. I believe his testimony was that those barrels contained from, I think, five to ten hams, depending on the size, and from twenty to twenty-five bacons. And the testimony of the weight, comparable weight of shoulder butts can be computed too. He said those were the three main (4) items that they hauled away.

He also testified that he observed other employees daily—every day some employees taking stuff for personal use; the fresh pork and sausage items; that they put it in their pockets. Mr. Harris didn't say in his testimony anything about capacious purses. That is what I said in my opening statement. That is one of the statements apparently we did not establish, a capacious purse. Mr. Harris said boxes.

We have the testimony there of Harris that about one-third of the employes were engaged in that pilfering. So, we have direct testimony. It is a very difficult thing to get direct testimony of theft. There were detectives hired,

as the evidence shows. They were never able to catch anybody. The supervisors were not able to catch anybody. When Mr. McConkey was around, nobody would steal anything. Nobody was caught except for a couple of people Mr. Beerman caught when he was there for a while, maybe being a little more alert than most people and being a little more suspicious as to their conduct. Up until the time that Harris was caught redhanded with the trash truck, they didn't actually catch anybody other than (5) these examples of small, petty pilfering.

So that, there is definite direct evidence from which one could make a rough estimate of how much had been stolen over a period of time. It would not be exact. It would be an approximation only. The law does not require that once it has been established with the requisite degree of certainty that damage has occurred, it does not require one to establish the amount of the damage with exactness. An approximation is suffiicient.

There are a number of cases which may be cited, many of them in the Supreme Court of the United States.

THE COURT: You cited them the other day, and you cited them in your supplemental trial memorandum. It is not necessary to go over that again.

MR. GOLDMAN: Those cases hold very plainly that where damage has been established by direct evidence, it is unnecessary to establish the amount with a degree of exactness, as long as there is some basis from which reasonable inferences may be drawn.

There are two methods that could be used in this case. The estimates could be made as to (6) the amounts in the barrels and over a period of time what that amounted to by the estimates of Mr. Smith into poundage and the figures given on the sheet as to the price and so it could be worked out in that way.

In addition to that, the jury may have the benefit of such weight as they see fit after hearing all the defendant's arguments which they make claiming how uncertain the figures submitted are. After all, that is merely a contention. The evidence of the plaintiff's witnesses is that there is no speculation. I am talking about the factual witnesses. There is no speculation involved in the product analysis sheets that affect the total result in any substantial manner. The fact is, and I think can mathematically be demonstrated, the intermediate inventories could be thrown away, nobody pay any attention to them whatever, because when you close one week with an inventory, no matter how wrong it may be, so far as those inventory figures are concerned, no matter how wrong they may be, they have no effect on this. I think the testimony has been, even if you ignore the inventory entirely, as long as you open up the next week with the same thing, it will be (7) self-correcting as far as the figures are concerned.

It has also been testified, as far as the beginning and ending inventories are concerned, any probable error in those inventories are based on the fact that there may have been some degree of approximation in there, does not have a significant effect on the total result when compared to the total volume of product that flowed through the plant.

There has not been any inventory which showed any great error in those approximations. It was admitted by the plaintiff that the weekly inventory other than the annual fiscal year ending inventory were not exact to the pound, but there has been no showing that there was any great errors in this. If you take any one of these samples and add up the probable error, they wouldn't amount to more than, at the most, a couple of thousand pounds. Assuming they were twenty pounds off, or take the maximum amounts of all these various hams they talk about, it

would only come to a couple of thousand pounds. When you consider the large volume of hams that flow through there, it would be insignificant.

(8) It has been the testimony of expert witnesses, factual witnesses, that the jury has a right to believe — they don't have to believe it — they could agree with the defendant that these experts don't know what they are talking about, even though it is a mathematical certainty that the intervening inventories can be ignored, I suppose even if the jury were instructed they had to consider that in their deliberations, who knows, they might ignore such instructions. I don't know. If they couldn't understand it, they might disregard it. They might say, "Those errors are not important."

As far as alleged errors in transfer, the plaintiff's witnesses say those are not errors. Plaintiff's witnesses say that it is in accordance with packing house practice and gives you an accurate result.

While it is true that in giving these round figures they were only to the nearest ham or bacon, as the case may be, when they came to the vat. They actually weighed these trucks of hams before putting them into the 14-hundred or 15-hundred vat, whatever it might be, and that if they were a ham under or over, if there was one (9) ham too many, they would take one out and one in if it be one under.

So, they might be within a part of a ham over or under the 14-hundred pounds or part of the bacon.

But, statistically, I can argue, your Honor, I think—your Honor wouldn't permit me to ask the question of the witnesses—it is a matter of mathematical statistics when you have thousands of cases of that kind where you might have overs and unders and there is no deliberate effort to make them one way or the other, as a matter of statistics

and a matter of actuarial computation, the law of probabilities come into effect, when you have those thousands of cases they average out in the round number.

That can be argued to the jury. The opposing side can say, "no, it is not so", and the jury don't have to believe me, if they don't want to. They can say, "Yes. The method of establishing the amounts for the transfers is inaccurate." Our people say it is accurate.

Their experience in the field, they have been in the business for years, Mr. Smith has been in the packing business for over twenty years (10) doing this controlling and supervision work. He is entitled to credit, if the jury wishes to give it to him, and he says it is accurate. Mr. McConkey has been in the business for many years, thirty years I think he said. He says it is accurate.

Now, I think that is a matter for the jury to decide whether they think it is or is not. They don't have to believe the witness. They can disregard this statement or they can accept it.

It seems to me that based on the small amount of mathematics I have had and familiarity with statistics, when you have a situation of that kind where you have overs and unders, if not deliberately planned one way or the other, which is by chance, and this is all by chance, and these small quantities, that the average over a period of time will be self-correcting, and you have here an average of almost a year in each case which involves close to hundreds of thousands of pieces, so it will be self-correcting.

So, I submit, therefore, that the alleged errors on this computation, those involving the intermediate inventories can be ignored completely, because they are (11) mathematically out of the picture. Those involved in the opening and closing inventories, one of those is correct. That is one beginning the second period. As to the others, it is

insignificant in the total result, and as far as alleged errors in transfers, there aren't any, according to our witnesses. Those are accurate.

Now, it has been admitted by Mr. Sachs on the stand that from such examination he made, he never found one example of where a figure was copied wrong or totaled wrong. There was some effort made to say, "Well, there may be in copying and transcribing these figures, because a number of different employes were involved." And he was satisfied from his examination that he had done on them. If he had any idea there were error he would have gone further.

So, we have a right to assume there weren't any errors.

Therefore, on the basis of the evidence submitted, if the plaintiff's witnesses are believed, there is no error involved in the computation, either of mistake or in transfers, or in the inventory. As I said before, there (12) may be in the opening and closing first period, and the closing of the second period, but any probable amount of error in those inventories are insignificant and do not materially affect the claim.

Now, there have been statements, as Mr. Hadler expressed the opinion, that these figures could not be said to represent theft. That is his opinion. He said to you he could not show it down to the penny. On the stand he explained that answer. He said he, himself, while satisfied that the factors used were correct, in his opinion they were arbitrary.

Now, according to the testimony of plaintiff's witnesses that the percentage of shrink allowed as normal were more than adequate, so long as they are not less than adequate, even if incorrect, the defendant suffers no harm. If they are more than adequate, the plaintiff has not indicated a large enough figure for his loss.

They make a great to-do about the fact that Mr. Hadler put on the sheet referring to cooler shrinkage. Now, actually, practically all the shrink in a packing plant is cooler shrink. There are different kinds of cooler shrinks. (13) It is true he said in 1953 when he was asked about that, he could not remember what he was told in 1950. He was under the impression that meant the original chilling shrink, but he professed he might have been in error and thought he was.

Of course, it is true that he discussed it with Mr. Smith who may have influenced him. But the fact is, Mr. Smith testified from actual test that the initial chilling shrink is approximately one and one-half to one and three-quarters percent. Mr. Davis, who is employed by a nationally-known concern that does nothing but consult with packers on their problems, he said he personally had supervised and had been involved in tests of shrinkage in twenty different plants and he says that one and one-half percent is adequate as the average for the initial chilling shrink.

He says in computing his averages he figures variations in temperature and humidity and all those other things that may go into it, and keeping stuff over the weekend as it would be in normal packing house practice.

Sucher ships out on Sunday night. (14) That is a 12-hour difference. Mr. Davis said in his figures, in figuring averages you figure those various aspects of it.

The testimony of Mr. Smith was that the cutting shrink was one-fourth of one percent. Mr. McConkey said it was one-half to one-quarter. Mr. Davis says a maximum of one-half. I think it was three percent is more than adequate to cover from hot weight to sale in the ordinary course of packing house business.

In addition to that, the plaintiff for purposes of being conservative in the claim, allowed an additional half percent, allowing a total of three and one-half percent.

According to Mr. Sachs, he admitted on the stand the plaintiff had allowed a total shrinkage as credit against any possible claim, in fresh pork between 300,000 and 350,000 pounds and for the other between 590,000 and 600,000 pounds.

There has been no evidence to contradict the plaintiff's testimony as to the proper shrink for sausage or the proper shrink for smoked pork. That stands uncontradicted in the record. In fact, the testimony of Mr. (15) Davis was that the plaintiff's figure of five percent is far in excess of what is allowed in the industry. His figures were two and one-half to three percent. I submit, under those facts, the jury has a right to believe the testimony they hear, particularly where it is uncontradicted, where these figures were more than adequate to cover any normal shrink due to acts of nature or ordinary business operations.

Now, even if you take the testimony of defendant's witnesses, the only testimony they gave was with respect to fresh pork. Mr. Bruner says his figures on cutting shrink were so unreliable he didn't want to stand up for them, there was too many possibilities of errors. So they don't mean anything. As to his normal shrink, he says it is two and one-half to three for twenty-four hours. The evidence at Suchers is that they kill one afternoon and cut the next morning. They don't stay in the cooler twenty-four hours. It is between sixteen and eighteen hours. The witness admitted any reduction in time in the cooler would cut down the chilling shrink, and if you take the thing percentage-wise, even Mr. Bruner's figures, could (16) be something around two percent or less, which is more than adequate, which the plaintiff use.

There is also some question about the reliability of Mr. Buner's figures and apparently in small plants where they run tests in a laboratory rather than normal operation.

Mr. Bowser had only eight or ten hogs. It may be his floor was dry which indicated that the atmosphere was wrong when he got excessive shrink. Be that as it may, it is a matter of argument to the jury as to the weight to be given to the figures. You have that in any case where you have experts on one side making claims and experts on the other side make other claims. The jury has to decide which is right.

You have that when you have appraisers as to value. You have that when you have any scientific testimony, medical testimony of any kind in a case. One doctor says yes, this is the result of something else, and the other doctor says no. The jury has a right to believe either one or neither, as the case may be.

So, I submit that all the arguments made by opposing counsel are more properly directed to the jury for the jury's consideration, rather (17) than on the question of law.

* * * *

(18) There have been some comments made that we did not allow for cutting shrink. Mr. Smith, when he testified. gave the figures for cutting shrink before there was any cross-examination. There wasn't any effort to avoid that fact. Of course, there is cutting shrink.

Under Sucher's figures, Suchers always took three percent off the hot weight. It is an accounting practice when you expect there is going to be some diminution of a product, you charge yourself with it in the beginning so you don't come up and find yourself short. That is why they took the three percent off in the beginning to account for all the natural shrink and to be conservative they made it plenty big (19) until the time of sale. So when they computed what they could expect to have for sale, they would not be cutting themselves, and if it were any more than that

it would be necessary to take it. The very fact that they used the three percent before this claim was ever even thought of and right in their regular practice, indicates very plainly that they considered that was adequate.

As I said before, there is no contest on the amount of normal shrink with respect to smoked pork or sausage. The only contest is with respect to fresh pork and that is a matter for the jury to resolve depending on what credit they want to give the witnesses and what weight.

Now this question about the record of the week of October 29th. After all, no one was expecting to make a claim or knew when the claim would be made against the bonding company until Harris was caught. There was no reason to preserve every week's record and these product analysis sheets had no value for an extended period of time, after they had been used. Those are not the permanent records of the company, such as their general ledgers and journals and that sort (20) of thing would be. These product analysis sheets are for the company's own information and after a period of time there is no point in keeping them.

Now, they did not deliberately get rid of this one folder. It was mislaid. Maybe someday it will be found just like the three folders for the last three weeks of September. It is amazing that they can find papers that they have intended to throw out and didn't. Some of these they deliberately throw out so as not to deprive them of space they need for other purposes.

The same is true as to the humidity and refrigeration records. Obviously, they wouldn't have done Mr. Sachs any good. There is no occasion to keep those records for more than a couple of months at a time. They were not expecting to make a claim back in 1949 and 1950, they were not preparing to make a claim. They knew something was wrong and were trying to find who was getting away with

the stuff. They were not doing that with the idea of making a claim. The testimony of Mr. Smith is, however, that there were no conditions there which would have adversely affected the amount of normal shrink.

* * * *

(23) There are three columns only for fresh pork; one for smoked pork and sausage. The fresh pork starting place is the weight of the dressed hog. The smoked pork starting place is the weight of the smoked pork after it is smoked. The separate weight don't go back to (24) the transfer to cure. Mr. Sachs admitted it showed a separate weight.

Had we used the earlier figures, then we would have been subject to criticism because you would have had the added weight in the cure and the subtracted weight in the smoked.

In this case also, in using the sausage we start with the weight of the sausage as it is produced, after it is produced, and the shrink is from that point forward and from the total shrink we subtract what we say is the normal shrink and which we say has been more than generous, more than adequate, and only charge against this claim the excess over and above the more than adequate normal we have allowed.

The same is true on smoked pork. We start with smoked pork weight and subtract from it the normal shrink which we say is more than adequate and charge against the claim only the excess. It does not go back to fresh pork at all and that is why I say that these figures on the board are nothing but to confuse matters.

Now, Mr. Selva says on this one case 111 Federal (2nd), which I cited, your Honor, the other day, that the manager said that the only (25) thing left to account for the missing merchandise was theft. We would have been very glad to

have our witnesses say that, if your Honor had permitted it. But questions of that kind, the objections to those were sustained. Obviously, it was not on the basis of that statement of the manager that the Court came to its conclusion. It was on the basis that it felt from the facts in the case, not the conclusion of any one witness, that the result was theft.

I maintain this, that there are two bases on which we should recover, either of which would be sufficient and when taken together make the case that much stronger. From Mr. Harris' testimony, we have direct evidence. We also have in the case the admission on the part of the defendant in a letter that at least $291 worth of merchandise was stolen. Even if you would substract the beef out of that, it is $270. I may say they are apparently willing to say we proved that conclusively. Of course, that is what the people were caught with.

In addition to Harris' testimony, I maintain from the figures we have produced, if (26) our witnesses are to be believed by the jury, and we have a right to believe that they will believe them, if we didn't we wouldn't have come into court, the jury has a right to believe that these figures are not subject to error, are not erroneous, and that such errors as there may be in the opening and closing inventories are insignificant in the total results. And they also have a right to believe that the allowances we have made which go into the hundreds of thousands of pounds. I think your Honor will see as to smoked sausage a tremendous shrink which would be more than from natural causes, but we said we would take those figures. There is a shrink that occurs in addition to that. There is no other explanation but theft.

In order to conclude that there is no other explanation, one has to reject the contentions of the plaintiff that the

normal shrink figures are adequate or reject the contentions of the plaintiff and the evidence of plaintiff's witnesses that the figures are not in error, or reject the contention of the plaintiff and the evidence that any possible error in the opening and closing inventories of the periods have only (27) an insignificant effect, if there are such errors.

I, therefore, submit that what we have in this case is direct evidence of theft from which computations can be made and that the jury in addition, for whatever weight is chooses to give it and for whatever credit it wishes to give the witnesses, based on its prerogatives as a jury, they can have the figures submitted to them. And, of course, they will be limited; they cannot bring in a verdict in excess of the amount under the bond. And, I may say at this point, I think we are limited to a total of $120,000. I will make that concession because we have shown only five identified employes, plus unidentifiable employes as a group who are involved in the theft. Under the terms of the bond we are entitled only to $20,000 maximum for each instance. And since the bond says "acting alone or in collusion with others", it is not our obligation to show how much each individual stole.

But if we show there was a ring of originally the four participants, as testified by Harris, Harris, Jackson, Maiden and Hurt, if this ring got away with $80,000 worth, then we are (28) entitled, as long as it says "acting alone or in collusion with others", at least $80,000, and if during the period that Early was connected with the ring, there was an additional $20,000 taken, we would be entitled to another $20,000.

In my own mind I question whether there was $20,000 worth taken while Early was a member of the ring, because he was a member of it a short time.

* * * *

Colloquy Between Court and Counsel

(30) THE COURT: The jurors will find that X pounds of these different categories of pork were stolen. How do they arrive at the value?

MR. GOLDMAN: That could be done, your Honor, in these folders. We tried to get it in by the testimony of Mr. Beerman which was not allowed, but the proffers are in the record, should your Honor change his mind. There are two points, one is that the evidence in the case shows the sales price, the average sales price. Obviously, the product was stolen over a period of time and the bond does not require you to identify with particularity each piece stolen, and what day it was stolen, which would make the bond unreasonable, because obviously, you would not know that. Thefts are stealthy. They sometimes don't even leave fingerprints. Their object is to defy apprehension and being caught, so that, you have to use the best evidence available in the case when you are attempting to prove the amount of damage, which, in this case is the average price. The sale price is the value, (31) that is the market. One would not have the right to assume Sucher could sell above the market price. But if there is any question about it, in these documents which have been testified to, I think Mr. Sachs agreed that in these documents are all the figures necessary to arrive at production cost.

* * * *

(32) THE COURT: This is the end of the 10th day of this trial. The Court recognizes that the trial work is strenuous both for the lawyers and the Court. I know that there are times that the nerves of all parties, including the Court, become jangled. We have reached a critical point in the trial of this case which has imposed upon the Court the responsibility of making a decision on this motion which affects the rights of the parties. The Court approaches the

matter of reaching this decision humbly and after long and very careful consideration of the problem and in the very best of the Court's ability, he will decide it.

I quote from a supplemental trial memorandum of counsel for plaintiff in which he states, as indicated in plaintiff's original trial memorandum, although I think it is not too obvious (Reads from trial memorandum of plaintiff.) I take it that the Court is (33) justified at this point in accepting that as plaintiff's theory that he is proceeding upon a matter of establishing direct theft and using the inventory as corroborating evidence.

Much has been said about whether or not the plaintiff's witnesses should be believed. I think the Court must decide the motion before it at this time upon the theory that all of the evidence of plaintiff's witnesses would be believed. The Court has a duty first to rule as a matter of law, assuming that all they say is worthy of belief or is to be believed, whether or not then there is any question of fact to be submitted to the jury.

It is obvious and well known that in negligence cases, the Court frequently must pass as a matter of law on whether certain conduct of a party is negligence. And so, in this case the Court comes to the point of passing upon the evidence submitted by the plaintiff as to whether or not believing all of it makes a case sufficient as a matter of law to go to the jury.

Upon the question of the inventory shortage, it seems to the Court to make little difference whether or not it is to be used as (34) corroborating evidence or whether or not the plaintiff seeks to recover the amount of the inventory shortage. It makes this difference in the mind of the Court: It seems that it would be less important or that there would be less reason for that matter of inventory

shortage to go to the jury, if it is merely being used as corroborating evidence, because in these cases where they seek a loss based on inventory shortage, they seek to recover the full amount of the inventory shortage on the theory that that is the proven loss.

I think it has been stated here many times through this trial, and not a matter in dispute, that virtually the plaintiff must exclude every explanation or every hypothesis except theft, and that there must be only the inference open that theft is the only explanation; that that fact must be open to only that reasonable and logical inference, that theft is the only explanation.

The Court is of the opinion that the facts in this case do not establish that situation with reference to the inventory loss attempted to be shown here.

* * * *

(35) The plaintiff in this case has asked the defendant for $120,000. I think it could be (36) expected that the plaintiff must offer more direct and correct proof than merely approximations.

* * * *

(37) Then there is the matter of claims made here. Plaintiff seeks, under the terms of the policy, to obtain $20,000 maximum provided by the policy for unidentifiable thefts and $100,000 for thefts of identified employes, with a total amount claimed of $146,000 now. There is no point at which the jury can tell where the loss for unidentified employes began and identified employes end.

* * * *

(38) Referring then to plaintiff's supplemental trial brief, it is stated: (Reads from plaintiff's supplemental trial brief.) In other words, the jury may determine what they think

these persons actually took and then attempt to test whether they are correct or not by the corroborating evidence of the inventory shortage. And Mr. Goldman says, whether they use it or not, as they see fit, such amount as they please. But the jury cannot speculate like that. There is nothing there that would guide them at all as to how much they could use, except if they are shocked with allowing plaintiff $120,000, they may say (39) "Well, we will only allow them half of that; cut it down ten or twenty percent." There is no basis for such a calculation.

So, the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff.

Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employes for there is no basis upon which such a determination could be made.

* * * *

(41) I realize that the matter of attempting to calculate damages on that testimony is rather uncertain and indefinite. I think the cases cited by Mr. Goldman would stand perhaps for the right to have the jury attempt to fix them, even though it was uncertain. I think those cases do not go to the extent of permitting the jury (42) to assess damages on such testimony as the inventory shortage.

The exhibits too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the matter of the inventory shortage should go to the jury.

Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury.

I think that about covers anything I can think of.

Colloquy Between Court and Counsel

MR. GOLDMAN: Your Honor, I had prepared some special charges. In view of your Honor's statement I could not offer a number of these. I wonder if I could be permitted to revise these over night?

THE COURT: I don't know whether counsel for the defense have any or not. If you do, I would like to meet with counsel at 9:30 and receive those.

No. ———

In The

Supreme Court of The United States

October Term, 1957

———

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. ———

THE SUCHER PACKING CO.,

Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Sucher Packing Co., respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in that court in the above entitled case, affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division, sitting at Dayton, Ohio.

OPINIONS BELOW

The trial court below wrote no opinion. The opinion of the Court of Appeals, copy of which is attached hereto as Appendix B, infra, is reported in 245 F 2d 513. The order of the Court of Appeals on the petition for rehearing is not reported, and copy is attached hereto as Appendix B, p. 30, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit herein sought to be reviewed was dated and entered on the 25th day of June, 1957. The order of the Court of Appeals denying a timely petition for rehearing was dated and entered on October 12, 1957.

Jurisdiction to review said judgment by writ of certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Should Rules 46 and 51 of the Federal Rules of Civil Procedure be construed together to obviate the necessity of formal specific exceptions to the actions of a trial court wherein it first allows the introduction of vital evidence, but later rules that it is withdrawing such evidence, and then in special instructions to the jury before argument and in its general charge orders the jury to disregard such evidence, if the party seeking to appeal from such actions has previously repeatedly made his opposing position clear to the trial court?

2. Does a party waive his right to claim error in a trial court's action, where after he makes his position clear to the trial court and is overruled, without further objection he so so modifies special charges previously prepared and so otherwise conducts himself as to conform to the trial court's adverse ruling?

3. (a) Where a witness refuses, under protection of the Fifth Amendment, to testify concerning thefts from petitioner, is a statement made by him to another person, admitting stealing from petitioner, admissible in evidence as an exception to the hearsay rule as a declaration against his pecuniary interest, even though it is also against his penal interest?

b. Does the claim of the Fifth Amendment render a witness sufficiently unavailable so as to make his extra-judicial statement against his pecuniary or proprietary interest, about which he has refused to testify, admissible under the exception to the hearsay rule?

4. Has Rule 61 of the Rules of Civil Procedure changed preexisting law to justify holding non-reversible the exclusion of convincing evidence which directly supports a party's position on principal issues in a case, such as the exclusion, in an action by an employer on an emplloyee fidelity insurance policy, of the confession by an employee that he had been stealing from the employer for five years when the length of time thefts had been going on, the degree of, and length of time of, participation of the employee in question in such thefts were among the principal issues in the case, and where such evidence was needed to support the testimony of another employee whose credibility was strongly attacked and whose testimony was not permitted to be otherwise supported under the trial court's rulings?

5. Is a court justified in excluding evidence because it believes the same unreliable, where such belief necessarily involves weighing the evidence and making resolutions of credibility?

STATUTES AND RULES INVOLVED

Title 28, U. S. Code, Section 2072 (consolidating former sections 723 b, 723 c and other sections) provides for the Supreme Court to establish Rules of Civil Procedure for the United States District Courts. Pursuant to such statutory authorization, the Supreme Court has promulgated such Rules. Involved in Question 1 above are Rules 46 and 51 of such Rules.

Rule 46 provides as follows:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an

exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Rule 51 provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Question 4 involves Rule 61, which provides as follows:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioner has filed with the clerk nine copies of the portions of the record in the trial court printed below, con-

sisting of four appendices in the following order: Appellant's Appendix, paged –a. Appellee's Appendix, paged –b. Reply Appendix, paged –c, and Rehearing Appendix, paged –r. Record references in footnotes hereinafter are to such appendices by their respective page numbers. The footnotes to which the exponential numbers hereinafter appearing refer have, for easier reading of this petition, been placed in Appendix A, beginning at page 26, infra, where they are available if wanted, rather than being interspersed throughout the petition.

The Claim

Petitioner, an Ohio corporation, filed a civil action in the Common Pleas Court of Montgomery County, Ohio against the respondent insurance company, on a "Comprehensive Dishonesty, Disappearance and Destruction Policy," indemnifying petitioner against loss resulting "from larceny, theft, embezzlement, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts * * * by any of the employees acting alone or in collusion with others, * * * and that part of any inventory shortage which the assured shall conclusively prove to have been caused by the dishonesty or fraud on the part of any of the employees * * *." The policy by special provision protected petitioner against loss by dishonesty of unidentifiable employees, respondent's liability being limited to $20,000.00 for each identified employee and to $20,000.00 for losses caused by unidentifiable employees as a class. Although the policy period was three years beginning November, 1947, the claims in suit covered only the period from November 5, 1948, to September 11, 1950, when a ring of employee thieves was caught. The amount sought to be recovered at the time of trial was $146,370.57 with interest.

Federal Jurisdiction

Respondent, being a Pennsylvania corporation and the amount in controversy exceeding Three Thousand Dollars, removed the case to the United States District Court for the Southern District of Ohio, Western Division at Dayton, on the ground of diversity of citizenship.

The Thefts

Petitioner is a substantial meat packer. In 1946 petitioner began to suffer severe losses, but the records then kept by the petitioner did not disclose their source. Beginning in 1948 new and elaborate records, methods and security devices were installed but the unexplained loss continued. By November, 1948, a detailed record keeping system had been fully established which showed the complete disposition of petitioner's products from slaughter to sale, with weights taken in every step of the process[1]. These records showed a continued disappearance of product for which there was no explanation in the honest course of business[2]. For the 47 week period ending October 22, 1949, pork products and sausage of at least 263,257 pounds, valued at $103,279.00, disappeared; for the 45 week period ending September 9, 1950, at least 126,654 pounds valued at $43,229.50, disappeared[3].

On September 11, 1950, petitioner's superintendent noticed a new barrel being used on the trash truck, when only old barrels were to be so used. Upon investigation, he found smoked hams in barrels under a layer of trash, and fresh shoulder butts under papers on the floor of the truck[4]. The trash truck driver, William Harris, was seized[5], confessed, and implicated four other employees, Jackson, Maiden, Hurt and Early, in thefts covering approximately a two year period[6]. Harris had been the regular trash truck driver only since July, 1950, but had been a spot laborer more or less regularly for about two years[7]. Jackson, Maiden

and Hurt had been regularly employed for years at the company, but Early for only a few weeks[8]. Harris and Jackson pleaded guilty, and were convicted and sentenced for grand larceny[9]. The record is silent as to the others.

At the time of his apprehension Jackson admitted to a private detective, Merica, that he had been stealing from the company for five years, but when called as a witness in the trial court, he refused to answer on the basis of the Fifth Amendment[10]. The petitioner then called Merica to the stand and attempted to have him testify as to this confession, as a declaration against the pecuniary or proprietary interest of Jackson but the trial court, in spite of many legal authorities submitted by petitioner, refused to admit such evidence indicating that he (the trial court) understood the exception to the hearsay rule to apply only to admissions of parties to the litigation[11].

Harris, when called as a witness, freely admitted that through Jackson he started stealing from company as part of the ring in 1948[12]. That until he became the trash truck driver a few weeks before his apprehension he helped the others load the barrels with stolen meat; that almost daily as many as three truck loads of four to five trash barrels filled with fresh pork shoulders, hams and sides of bacon were taken, sold and the proceeds divided among the confederates, the loaders and the drivers[13]. He also testified that daily he saw almost one-third of petitioner's employees whom he did not know by name, take sausage and pork loin cuts and put them in their pockets[14].

Petitioner's Records

Upon apprehension of the ring, petitioner notified respondent, and also employed a firm of certified public accountants to attempt to ascertain the amount of the loss. At the trial, the accountants testified as to the loss, using as a basis, weekly summaries (product analysis sheets) of petitioner's detailed records[15]. These records reported the

weights of the products, fresh pork, smoked pork, sausage, etc., at every stage of its processing, all slaughtering weights, all purchases, sales, all transfers between departments, as well as opening and closing inventories, with proper allowances for weight shrinkage due to evaporation, smoking and cutting losses[16]. These detailed records and the weekly summaries (product analysis sheets) based thereon showed the complete disposition of all petitioner's products in the honest course of business, and showed a substantial disappearance of product for which there was no explanation in the honest course of business[17]. Petitioner's witnesses testified that these records were accurate, and that any errors or approximations which might appear therein, on accounting and actuarial principles, would have only a negligible effect on the accuracy of the resultant loss shown[18].

Action of the Trial Court and Petitioner's Counsel

These weekly summaries and voluminous detailed records for the period from November, 1948 to September, 1950 were first admitted in evidence by the trial court without objection and referred to by the trial court as "inventory shortage" evidence[19]. Petitioner from the outset contended that these records and computations made therefrom were offered to corroborate the direct evidence of theft from Harris' testimony and would help fix the amount of the loss, as without the benefit of such figures, the jury would have great difficulty in arriving at the damage suffered by petitioner with any degree of exactitude from Harris' testimony alone[20]. This contention was supported by two separate briefs submitted to the trial court during the trial, covering the admissibility, purpose, importance and persuasive character of such evidence[21]. At the close of the plaintiff's case and again at the close of all the evidence upon arguments on respondent's motions for a directed verdict, petitioner's

counsel repeatedly urged the same contentions on the trial court and also insisted that petitioner was entitled to recover for loss by unidentified employees[22], but the trial court ruled at the conclusion of the latter argument that it was withdrawing all such evidence of both kinds from the jury's consideration[23]. Counsel for petitioner thereupon advised the trial court that he would have to revise the special charges which he had prepared in order to comply with the court's rulings, and presented them to the trial court after being so modified[24].

The trial court then gave special instructions to the jury before argument incorporating his rulings withdrawing the "inventory shortage" evidence from their consideration and withdrawing the issue of loss from theft by unidentifiable employees from the case[25]. In his general charge he again repeated his ruling that the "inventory shortage" evidence was to be disregarded[26]. Counsel for petitioner took no formal exception when the trial court announced his rulings at the close of the argument on the motion for a directed verdict, or when the court gave its special instructions to the jury incorporating such rulings before final summations. At the close of the general charge, however, counsel for petitioner did specifically except to the exclusion of the records[27].

Other Errors

The trial court committed numerous other errors to the prejudice of petitioner but in the interest of brevity they will not be discussed in the body of this petition[32].

The Verdict and Judgment

The trial court submitted the case to the jury upon a form of special verdict which required the jury to decide the dates and times of, and participants in, any dishonest acts, the numbers of hams, shoulders and bacons, if any,

taken through the dishonesty, if any, of each of the five named employees, and the approximate weight in pounds of each item[28]. Counsel for petitioner excepted to the degree of specificity required by the form of the special verdict[29]. The jury after being out six hours found that it was unable to state the number of pounds of the various types of pork stolen[30], and that there was insufficient evidence to find Maiden, Hurt and Early guilty[31].

The trial court entered judgment for petitioner for $83.00 (with interest and costs), being the approximate difference between $291.14, the value of specific pieces of stolen meat traced to the hands of their purchasers by respondent after Harris' apprehension and the $208.00 in wages withheld by petitioner from Harris, Jackson, Maiden, Hurt and Early, even though petitioner would still be liable for the wages withheld from Maiden, Hurt and Early, if they were not guilty.

Petitioner's motion for a new trial was overruled.

Rulings by The Court of Appeals

On appeal to the Court of Appeals, the judgment was affirmed, the court holding that the failure of counsel for petitioner to except to the judge's instructions before final summations withdrawing the "inventory shortage" evidence was a waiver of the right to claim error in regard thereto under Rule 51, and that the specific exception taken to the similar portion of the general charge was not clear enough.

The Court of Appeals then held that because counsel for petitioner had submitted a requested special charge to the trial court which sought to relieve petitioner from the burden of conclusive proof required by the policy for losses proved by inventory shortage alone, petitioner had waived the right to complain of the trial court's instructions withdrawing all "inventory shortage" evidence.

The Court of Appeals also ruled that because petitioner's counsel had not made a formal objection to the withdrawal by the trial court of the issue of loss from thefts by unidentifiable employees and had thereafter complied with such ruling, any possible error in this regard was waived under Rule 51.

The Court of Appeals further decided that the refusal of the trial court to admit the declaration against interest of Jackson as to his role in the thefts, whether erroneous or not, would not be reversible error.

Although the Court of Appeals expressly stated it was not deciding whether petitioner was entitled to have the "inventory shortage" records go to the jury as corroborating evidence to the direct evidence of theft since it had held that any possible error in regard thereto had been waived, it did seriously disparage the persuasive quality of such corroborating evidence. Petitioner contends that the weight and credibility to be accorded such evidence was for the jury, not the court. To avoid unduly lengthening this petition a special note discussing this point has been included at the end of Appendix A, if this Court should wish to read it.[47]

REASONS FOR ALLOWING THE WRIT

CONFLICT WITH OTHER CIRCUITS

Conflict on Question 1

The decision in the Court of Appeals below with respect to the extent to which Rule 46 and Rule 51 of the Federal Rules of Civil Procedure should be construed in pari materia, as posed in Question 1, is in direct conflict with decisions of the Court of Appeals for the Second Circuit in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (CA 2, 1952), cert. den. 343 U.S. 966, 72 S. Ct. 1061, 96 L. ed. 1363, and *Troupe* v. *Chicago, Duluth and Georgian*

Bay Transit Co., 234 F. 2d 253, 258-9 (CA 2, 1956), on exactly analogous fact situations.

It also conflicts on Question 1 with the decision of the Court of Appeals for the District of Columbia in *Harlem Taxicab Association* v. *Nemesh*, 191 F. 2d 459, 461 (CA DC, 1951), on what appear to be anologous facts, and in principle with decisions of the Court of Appeals of the Third, Seventh and Eighth Circuits and with an earlier decision of the Sixth Circuit itself in the following cases: *Green* v. *Reading Co.*, 183 F. 2d 716, 719 (CA 3, 1950); *U. S.* v. *General Motors Corp.*, 228 F. 2d 745, 750 (CA 3, 1955); *Irvin Jacobs and Co.* v. *Fidelity & D. Co. of Maryland*, 202 F. 2d 794, 800-801 (CA 7, 1953); *Hower* v. *Roberts*, 153 F. 2d 726, 729 (CCA 8, 1946); *Williams* v. *Powers*, 135 F. 2d 153, 156 (CCA 6, 1943).

In spite of the fact that petitioner had made its position clear to the trial court, by two separate legal memoranda and extended oral arguments, that it was offering its product disposition records (loosely referred to as "inventory shortage" records because they did show inventory shortages), not so much for the purpose of proving by themselves inventory shortage losses under the inventory shortage provisions of the policy, but rather as corroborating evidence to the direct evidence of theft by Harris, one of the thieves, and to assist the jury in arriving at a more accurate estimate of the amount of the loss both from identified and unidentified employees, and that the evidence was not only admissible but convincing, and although the records had previously been admitted without objection, the trial court, after stating that he understood petitioner's position[33], specifically overruled petitioner by ruling that he was withdrawing the records and also the entire issue of loss from thefts by unidentified employees[34]. He then incorporated his rulings in his special[35] and general charges[36]. Petitioner did not take formal exception to the rulings or to the special instructions. It did except to the general charge

The Court of Appeals below held that Rule 51 required specific objections to instructions; that although Rule 46 made exceptions during the trial no longer necessary, it did not relieve a party from excepting to instructions, and that since petitioner did not except to the instructions, the questions raised were not saved for review.

Indeed, the Court of Appeals was so firm in this view that it held that even a statement by the trial judge early in the case, when petitioner excepted to one of his rulings, that "exceptions are not necessary",[36a] did not help petitioner. The Court of Appeals went still farther and held not specific enough the exception which petitioner took to the general charge, which included the following[37]:

> "Also take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered (.) in describing the inventory shortage evidence."

While not a model of syntax, this extemporaneous exception did refer to the trial court's earlier decision excluding the records for any purpose, and could not have been understood by the trial court to have had any other meaning, especially in view of the constant reiteration of petitioner's position as to such records during the trial. The Court of Appeals held nevertheless that Rule 51 was not satisfied.

In the *Keen* case in the Second Circuit, a crew member sued the ship owner for injuries from an attack by a fellow crew member. Plaintiff sought to prove that the fellow crew member was temperamentally unfit for duty and his counsel argued that it made no difference whether the defendant knew it or not. The trial judge advised counsel that in his view such unfitness was not a ground of liability unless it had come to the defendant's knowledge. The

judge later so charged the jury. Petitioner's counsel did not except either to the ruling or the charge. The Court of Appeals through Judge Learned Hand ruled that the error was nevertheless preserved, saying at 194 F. 2d 519:

> "It is indeed true that plaintiff did not except to that ruling, any more than to the charge; but he had made his point clearly, the judge had overruled him * * * and these circumstances satisfied Rule 46. * * * Moreover, the plaintiff's failure later to repeat the objection or to conform literally to Rule 51, was not a 'waiver' of the ruling against him * * *. The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again."

In the *Troupe* case there were two issues and motions for directed verdict as to both were made at the close of plaintiff's case and again at the close of all the evidence. After hearing plaintiff's argument in opposition, the trial court overruled both motions, but later apparently changed his mind and charged one issue out of the case. No exception was taken. The Court of Appeals for the Second Circuit ruled that even though the action of the trial court was incorporated in its instructions it was in effect a delayed ruling on the exclusion of one issue; that such rulings are governed by Rule 46 rather than Rule 51, that therefore no exception was necessary since plaintiff's position had been made clear to the trial court.

The case at bar is exactly analogous. After having first admitted the "inventory shortage" evidence and the evidence of loss by unidentifiable employees, and after petitioner's position with respect thereto was made very clear to the trial court, the trial court changed his mind, ruled out all this evidence, and instructed the jury to disregard it. Under the *Troupe* case, the actions of the trial court here were rulings on the evidence within the purview of

Rule 46, and petitioner's position having been made clear to the trial court, no objections to the trial court's instructions incorporating his rulings, under Rule 51, were necessary.

From the foregoing it is clear that the decision below directly conflicts on Question 1 with decisions of the Second Circuit under exactly analogous facts in the *Keen* and *Troupe* cases. The conflict below with the *Harlem Taxicab Association* case in Court of Appeals for the District of Columbia, above cited, is also direct, although the facts in the latter case on the point are not quite so clear. The conflict with the decisions in the other Circuits above cited is in principle because in those cases the Courts of Appeals held it was not necessary to take exceptions to the trial judge's instructions, but in each case the appellant's position had been made clear through proffered requested instructions which the judge refused.

Conflict on Question 2

The decision below on Question 2 herein is directly in conflict with the Court of Appeals for the Second Circuit in the *Keen* case, supra.

After the trial court in the case at bar ruled that it was withdrawing the "inventory shortage" evidence and the issue of loss from thefts by unidentified employees, petitioner's counsel advised the court that he would have to revise special requested instructions which he had previously prepared in order to comply with the judge's rulings.[38] As the court had ruled out all "inventory shortage" evidence, counsel wanted to be sure that the jury understood that petitioner was only required to prove its case by a preponderance of the evidence and not by conclusive proof, which the policy required for loss proved by inventory shortage alone; so petitioner's counsel presented a revised requested instruction to that effect to the judge.[39] This request was overruled by the judge.[40] Also after the

judged ruled that he was excluding the issue of loss from unidentified employees, petioner's counsel did not pursue that claim, which included all of the sausage portion of the total claim, and tried to explain the elimination of the sausage portion of the claim to the jury with as little damage to his client as possible in the eyes of the jury.[41]

The Court of Appeals below ruled that by presenting the revised special charge in question and by complying without objection with the trial court's ruling excluding the issue of loss from unidentified employes, petitioner waived its right to claim error in the judge's rulings. It apparently made no difference to the Court of Appeals that the trial judge refused the special instruction on the ground that, as he had previously announced, he was going to take "away from the consideration of the jury the matter of attempting to determine any damages by virtue of inventory shortage."[42]

The Court of Appeals of the Second Circuit speaking through Judge Learned Hand, took exactly the opposite view in the *Keen* case, supra, when it said at 194 F2d 519:

> "Moreover, the plaintiff's failure later to repeat the objection, or to conform literally to Rule 51, was not a 'waiver' of the ruling against him: *he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him.* Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided." (emphasis added)

This language is clearly in conflict with the ruling of the Court of Appeals below. In submitting the special charge on the degree of proof and in not pursuing the claim of loss from unidentified employes after the judge's rulings against it, petitioner acted just as Judge Hand said was his right: "he had taken his position, had lost," and was

attempting thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him."

This Court, it is respectfully urged, should resolve the conflict between the Circuits on Questions 1 and 2 herein.

IMPORTANCE OF THE QUESTIONS — NEED FOR DECISIONS BY THIS COURT

The questions raised by this petition are very important questions of federal law which have not been but should be settled by this Court.

Question 1

Since by law this Court prescribes the Federal Rules of Civil Procedure, any uncertainties in their meaning should be resolved by this Court.

Rule 46 says no exceptions are required where a party's position has been made clear to the trial court. Rule 51 says objections are required to instructions so that a party's position is made clear to the judge, but is silent as to whether they are required if a party's position has already been made clear to the judge on the point raised. Where in a trial does Rule 46 end and Rule 51 begin? Do they overlap so that they should be construed in pari materia to obviate the necessity for objections to instructions if the complaining party has previously made his position clear to the trial court and been overruled? The Court of Appeals below said, "No"; other Circuits, as indicated say, "Yes." But regardless of this conflict among the Circuits, it is apparent without further discussion that the question is obviously of prime importance to all lawyers and judges in the federal courts.

In the interest of the orderly administration of justice and uniformity of operation under these Rules, this Court should take this opportunity to eliminate the conflict and

uncertainty in meaning of Rules 46 and 51, caused by the decision below, and make a definitive pronouncement as to the extent to which they should be construed in pari materia.

Question 2

This question is really a corollary of Question 1. Even without the conflict between the Second Circuit and the Sixth Circuit below, Question 2 is definitely also one of great interest to the bar and bench alike in the federal courts.

Even though a party has taken a position and is overruled, if thereafter he conforms to the judge's ruling, without further objection or exception, in the form of special charges submitted or other action taken, the Court of Appeals below holds he has acquiesced to the point of having waived his right to appeal from such ruling. This would certainly seem to be contrary to the apparent intent of Rule 46.

To settle the uncertainty caused by the decision below as to what is required to preserve points for review, as posed by Question 2, and the effect of Rule 46 on the same, a decision by this Court is necessary.

Question 3

(a) Does DONNELLY v. U. S. Apply to Jackson's Admission to Merica?

When this Court over forty years ago decided *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. ed. 820 (1913), its ruling that a declaration against a penal interest was not admissible as an exception to the hearsay rule was the subject of a very vigorous, and, we say most respectfully, devastating dissent by Mr. Justice Holmes in which Mr. Justice Hughes and Mr. Justice Lurton joined. It was likewise severely criticised by text writers. As pointed out by Dean Wigmore in his work in Evidence, 3rd Edition, Sec-

tions 1476 and 1477, for nearly 200 years English Courts had treated as admissible a declaration which constituted an admission of a crime, but in 1844 the House of Lords in the *Sussex Peerage* case, 11 Cl. & F. 109, without considering prior precedents and giving no logical basis therefor, announced the rule that such a declaration could not be received as a declaration against interest. Yet, as stated by Wigmore, this Court based its decision in *Donnelly* solely on the English cases which followed the *Sussex Peerage Case*.

Both Mr. Justice Holmes and Wigmore pointed out how illogical it was to exclude an admission of a crime as a declaration against interest, since there is even less likelihood that a person will falsely confess to a crime than that he would make a false declaration against his mere proprietary or pecuniary interest.

Many courts have refused to follow *Donnelly*, or have held that it does not apply in civil cases, or that a declaration against a pecuniary or proprietary interest does not lose its admissibility even though it should also be against the penal interest of the declarant.

G. M. McKelvey Company v. *General Casualty Company*, 166 O.S. 401, 142 NE 2d 854 (1957); *Sutter* v. *Easterly*, 354 Mo. 282, 189 SW 2d 284 (1945); *Clark & Jones Inc.* v. *The Amer. Mut. Cas. Ins. Co.*, 112 F Supp. 889 (D.C. ED Tenn. 1953); *Newberry* v. *Commonwealth*, 191 Va. 445, 61 SE 2d 318 (1950); *Citizens National Bank of Los Angeles* v. *Santa Rita Hotel Co.*, 22 F2d 524 (CCA 9, 1927); *Webber* v. *Chicago R. I. & P. Ry. Co.*, 175 Iowa 358, 151 NW 852 (1915); *Truelsch* v. *N. W. Mut. Life Ins. Co.*, 186 Wis. 239, 202 NW 352 (1925); *Brennan* v. *State*, 151 Md. 265, 134 A. 148 (1926). See also *American Law Institute Model Code of Evidence*, Rule 509 (1).

In the case at bar, Jackson's admission to detective Merica that he had been stealing from the petitioner for

five years was certainly against his pecuniary interest because he was liable civilly to petitioner for what he had stolen, and his declaration should have been admitted. Although most of the cases cited above were cited to the trial judge[43] he adhered to his ruling excluding the evidence.[44] It is submitted that such exclusion was very prejudicial error.

In view of the lapse of over forty years since *Donnelly* was decided, the severe criticism to which it has been subject, the action of so many courts and authorities in refusing to follow it or in distinguishing it, and the prevailing opinion that it was wrongly decided in the first place, *Donnelly* should be overruled, or at least these questions should be answered authoritatively by this Court for the guidance of the federal courts and those who practice there: Is *Donnelly* still to be followed? If so, does it apply to civil cases, or does it apply if the declaration sought to be introduced is against the pecuniary interest of the declarant as well as against his penal interest?

(b) Does Claiming the Fifth Amendment Make a Witness Unavailble?

A sub question under the main part of Question 3 is whether the refusal to answer under protection of the Fifth Amendment makes a witness sufficiently unavailable so as to render his extra-judicial declaration against his pecuniary interest admissible under the exception to the hearsay rule.

This question has been answered in the affirmative in the only cases which petitioner has been able to find on the point. They are *Sutter* v. *Easterly* supra, *Moore* v. *Metropolitan Life Ins. Co.* (Mo. App.) 237 SW2d 210, 212 (1951) and *Newberry* v. *Commonwealth*, supra.

One of the elements necessary to qualify a declaration against interest as admissible as an exception to the hearsay

rule is that the declarant must be unavailable as a witness by reason of death, absence from the jurisdiction or otherwise not amenable to compulsory attendance at the trial. All the cases just cited take the view and logically so that a refusal to testify under protection of the Fifth Amendment makes a person equally as unavailable as a witness as if he were dead or otherwise beyond the jurisdiction of the court.

This additional aspect of the Fifth Amendment as applied to federal court practice is peculiarly within the province of this Court to decide. With the heightened interest in the Fifth Amendment and its probable greater frequency of use, this important question of a basic rule of evidence as applied to the federal courts should be settled by this Court.

The Court of Appeals below, after discussing Question 3, left the ultimate answer undecided and left standing the decision of the District Court excluding the evidence, ruling that whether or not the exclusion was error, it was not reversible under Rule 61 of the Federal Rules of Civil Procedure. This leads to a discussion of Question 4.

Question 4

Has Rule 61 Changed The Harmless Error Doctrine Under Previously Existing Law?

This Court has not as yet construed Rule 61 of Rules of Civil Procedure. The notes of the Advisory Committee on the Rules indicate that it is a restatement of the previously existing law on harmless error.

Prior to the adoption of Rule 61 this Court has on a number of occasions defined the principles which determine whether error is harmless or not. In *Williams v. Great Southern Lumber Company*, 277 U.S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417 (1928), this Court held the exclusion of material evidence to be prejudicial and said:

> "Since the passage of this act (28 U.S. Code 391, the former harmless error statute and forerunner to Rule 61), as well as before, an error which relates not to merely formal or technical matters, but to the substantial rights of the parties is to be held a ground for reversal unless it appears from the whole record that it is harmless and did not prejudice the rights of the complaining party."

To the same effect, *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct., 764, 80 L. Ed. 1205 (1936).

In an earlier case, *Crawford* v. *United States*, 212 U.S. 183, 203, 53 L. Ed. 465, 473, 29 S. Ct. 260 (1909), this Court held, in ruling that an exclusion of corroborating evidence in that case was prejudicial:

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown by the record that the commission of such an error against the party seeking to review it is not cause for the reversal of the judgment."

In *Kotteakos* v. *United States*, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), this Court ruled that it is not enough to render an error at a trial harmless for the Appellate Court to be convinced of the justice of the result, but the Appellate Court must be convinced that the jury would not have been affected by the error (328 U.S. 764). This Court laid down the rule to be applied as follows (328 U.S. 365):

> "But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

The Court of Appeals, however, construed Rule 61 contrary to the preexisting law of "harmless error" as laid down by the decisions of this court.

The Court of Appeals held that Rule 61 rendered the exclusion of Jackson's confession harmless because it felt that substantial justice had been done in view of its opinion (1) that there were various instances of losses, (2) that there were many errors in petitioner's computations and deficiency in proof as to what was stolen and how much, and (3) the jury's refusal to attach credit to petitioner's evidence of losses of hundreds of thousands of pounds. All but the last of these reasons are based on the Court of Appeals' low estimate of the persuasive character of the "inventory shortage" evidence which was excluded and, therefore, could not have been considered by the jury; as to the last reason given by the Court of Appeals, it must not be forgotten that the jury only found that there was insufficient evidence to determine the number of pieces or number of pounds of each kind of meat that was stolen[45] and the sole reason for the insufficiency of the evidence was the exclusion by the Court of the records which would have given the jury the necessary figures. Thus, all the reasons given by the Court of Appeals were based not on evidence which the jury considered but on excluded evidence which the jury was not permitted to consider.

In the case at bar, the question to be decided is whether any substantial right of petitioner was adversely affected by the exclusion of Jackson's confession. Unless Rule 61 is to be given a different interpretation from the law as laid down in the *Kotteakos* and other cases above cited, then the Court of Appeals' interpretation is wrong. It based its conclusion on its own opinion of the justice of the result instead of using the possible effect on the jury as a yardstick. To make matters worse, all of its reasons

were based on its consideration of other ("inventory shortage") evidence which had been excluded from the jury. No one knows how much weigth or credit the jury would have given that excluded evidence, regardless of how little the trial court or the Court of Appeals may have thought of it, because the jury was not permitted to consider it at all.

The trial court instructed the jury that petitioner's case rested entirely on Harris' testimony and then, in effect, told the jury that Harris was unworthy of belief. Under such circumstances, any support for Harris was vital to petitioner. For example, the only evidence of Jackson's complicity outside of Harris' testimony was his formal plea of guilty of theft on the one day of September 11, 1950 and the jury consequently found in the special verdict that Jackson's thefts were confined to September 11, 1950. If the jury had been permitted to consider Jackson's admission that he had been stealing for five years from petitioner, in all likelihood the jury would have found that Jackson had been stealing from the petitioner for the entire period of the claim instead of merely on September 11, 1950. It is even quite possible that if Harris' testimony had been buttressed by the Jackson admission, the jury might have been willing to believe Harris' testimony with regard to Maiden, Hurt and Early. Since the employment records showed that Jackson had been working for petitioner for more than five years,[46] with Jackson's admission in evidence, there would have been much more plausibility to Harris' statement that the ring headed by Jackson had been in operation for at least two years, and the jury would probably have so found.

In view of the fact that this Court has not yet construed Rule 61 and that the Court of Appeals has construed that rule contrary to the principles for determining harmless error as laid down by previous decisions of this Court, it is very important in the administration of justice and to all

who preside and appear in the federal courts that this Court settle the true intent and meaning of Rule 61.

Question 3

Although the trial court decided this question against petitioner, the Court of Appeals found it unnecessary to rule on it because of its decision on Questions 1 and 2. Therefore the same will not be argued in this petition, but petitioner hopes the same may be presented should this petition be allowed.

CONCLUSION

As the decision of the Court of Appeals below on Questions 1 and 2 herein are in conflict with other Circuits and as the decision below raises questions of the proper interpretation of Rules 16, 51 and 61 of the Federal Rules of Civil Procedure as well as important rules of evidence in the federal courts, which this court has not settled and should settle, it is respectfully urged that this petition for certiorari be allowed and upon such allowance the judgment below be reversed.

Respectfully submitted,
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APPENDIX A

Footnotes

1 24, 25a, 26a, 33a, 34a
2 Pltf's. Ex. 6, 231a, 30a, 33a-39a, 82a-86a, 92a, 113a-114a, 117a
3 Pltf's. Exhibits 6, 21 and 26, 231a, 241a and 242a
4 142a
5 143a
6 17a, 18a, 22a, 134a
7 17a, 141a, 215a-216a
8 22a, 149a
9 12a, 50a
10 16a, 135a
11 13r, 14r-19r, 134a-135a, 156a
12 17a
13 17a, 18a, 19a, 20a, 21a
14 19a-22a
15 32a-39a, 117a, 34a-39a, 243a
16 26a, 27a-29a, 34a, 45a, 51a, 52a, 53a, 54a, 55a, 57a-58a, 82a, 98a, 103a, 104a, 136a, 137a, 138a, 139a, 147a, Pltf's Ex. 6, 231a
17 30a, 68a-69a, 77a-78a, 84a, 113a-114a
18 27a, 59a, 60a, 62a-63a, 64a-66a, 73a-75a, 76a-77a, 86a-87a, 96a-97a, 99a, 100a-101a, 111a, 120a, 122a-123a, 124a-125a, 139a-140a, 143a, 8c
19 59a, 63a, 159a
20 1r, 4r, 5r, 6r, 13r, 20r, 24r, 25r, 40r, 41r, 50r, 51r
21 1r-5r, 5r-13r
22 20r-38r, 38r-52r
23 55r
24 56r, 198a-202a
25 209a
26 214a
27 224a
28 8a-14a
29 224a
30 Paragraphs (8) on 10a, 11a
31 Paragraphs (7) on 12a, 13a, 14a
32 The trial court charged the jury that petitioner's case rested almost solely on Harris' testimony and said in effect Harris was unworthy of belief (215a). The charge disparaged Harris' implication of Maiden, Hurt and Early in the thefts and erroneously stated Harris' testimony on that subject. Harris, after first stating that Maiden, Hurt and Early were "involved" with him, then elaborated by stating that their involvement consisted of doing the same thing that he did, to wit, loading the barrels, (48a) yet in its charge the court stated that Harris had merely said that they were "involved" with him, that this was a conclusion and did not have much meaning, (216a) even though Harris had amplified the use of the word "involved" by stating what the others actually did.

Furthermore, the trial court refused to permit the petitioner to comment on respondent's failure to offer the written statement with which the respondent had sought to impeach Harris, (212a, 199a-200a, 202a, 226a, 227a) and likewise refused to permit petitioner to defend itself against the charge and that defendant should have introduced statements by Maiden, Hurt and Early, although petitioner could not have properly done so (Instruction No. 3, 200a, 203a, 226, 227a) since they were available as witnesses and could

have been called by respondent had it chosen to do so. The trial court also suggested, unfairly it is most respectfully submitted, that petitioner had supressed employment records by referring to the fact that petitioner had disposed of old time cards. (216a) But omitted to state that this was after a check by the Wages and Hours Division of the Department of Labor and that at that time there was no further need to retain time cards. (101a-103a) since no question had then been raised by the respondent as to the periods of Harris' employment. The trial court also refused to permit petitioner reasonable cross examination of respondent's principle witness or to impeach that witness by confronting him on cross examination with prior contradictory statements made by him earlier in the trial, the trial court ruling that prior contradictory statements could be used only to impeach when made outside the trial. (189a) The trial court also refused a number of requested charges submitted by petitioner on the burden of proof, (201a-202a, 204a) the right to comment upon Jackson's refusal to testify (225a, 227a) and on the requisite proof to establish damages. (201a, 202a)

35 At the conclusion of the argument on the motion for directed verdict at the close of all the evidence the trial court, after making several references to petitioner's legal memoranda, said:

> "I take it that the Court is justified at this point in accepting that as plaintiff's theory that he is proceeding upon a matter of establishing direct theft and using the inventory (shortage) as corroborating evidence." (53r)

34 The trial court, after hearing all the arguments on the motion for directed verdict at the close of all the evidence, and after stating that it understood petitioner's position that it did not help petitioner to offer the records as corroborating evidence, but before any requested instructions were submitted, made his ruling as follows (55r):

> "It is the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff. Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employes for there is no basis upon which such a determination could be made."

35 209a
36 214a
36a 2c
37 224a
38 After the judge had announced that he was ruling out "the inventory shortage" evidence and the evidence on the issue of loss from theft by unidentified employees and before any special charges were submitted to the court, petitioner's counsel stated as follows (56r):

> "Your Honor, I had prepared some special charges. In view of your Honor's statement I could not offer a number of these. I wonder if I could be permitted to revise them overnight."

The Court replied:

> "I don't know whether counsel for the defense have any or not. If you do, I would like to meet with counsel at 9:30 and receive those."

39 Instruction No. 8, 201a-202a
40 204a
41 After making his rulings excluding inventory shortage evidence and the issue of loss from unidentified employees the trial court said (55r):

> "The exhibits too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the

the matter of the inventory shortage should go to the jury."
"Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury."

42 204a

43 13r, 14r-19r

44 134a-135a, 156a

45 Paragraphs (8) on 10a and 11a

46 149a

47 The Court of Appeals as the basis for its disparagement of the persuasive character of the petitioner's product disposition ("inventory shortage") records adopted the respondent's claims that those records were unreliable because the shortages might be due to: (1) Errors in weekly inventories. (2) Errors because transfers between departments were in round numbers. (3) Spoilage. (4) Mistakes. (5) Insufficient allowance for natural shrinkage, and (6) No allowance for additional shrinkage over weekends. Petitioner's witnesses, expert and factual, disposed of each and everyone of these contentions. They stated:

1. That the accuracy of weekly inventories were immaterial because any possible errors therein cancelled each other out mathematically as the closing inventory for one week was the opening inventory for the following weeks. Further, that any possible error in the opening or closing inventory for an entire accounting period would have only a negligible effect on the results because they would be so small compared to the tremendous flow of products through the plant during the period (59a, 60a, 63a, 64-66a, 73-75a, 76-77a, 86a-87a, 96-97a, 100a, 101a, 120a, 122a, 123a, 8c);

2. Actually round numbers used on transfers produced no appreciable error in the results because first that was universal practice in the industry; second they were very close to being mathematically accurate and finally because of the thousands of transactions involved, any "overs" would balance out "unders" with no appreciable resultant net error. (27a, 62-63a, 66a, 99a, 111a, 124a-125a, 139a-140a, 143a);

3. Spoilage was not a factor because spoiled products were not destroyed; they were transferred to lard or tankage and in either case a record was kept and proper credits given (27a-28a, 70a, 92a, 25c, 29c-30c);

4. There was no evidence of any uncorrected mistakes. Even respondent's own auditor, who spent weeks going over petitioner's records, found not even a single mistake (177a-178a). Petitioner's auditor was likewise satisfied. (19c-20c);

5. Petitioner made more than adequate allowance for natural shrinkage (29a, 53a, 57-58a, 103a, 136a, 147a, 231a, 241a, 242a), even respondent's auditor admitted that petitioner allowed almost 1,000,000 pounds for natural shrinkage of fresh pork and almost 200,000 pounds for natural shrinkage of sausage alone (172a, 173a, 175a);

6. The time products held over weekends (from Saturday to Sunday evening when petitioner shipped out), was considered in the natural shrinkage allowance made by petitioner. Also, an additional stay in petitioner's cooler over weekends was more than compensated by taking a natural shrinkage allowance at full percentage for whole dressed hogs shipped out immediately and for 70% of the product which was transferred to other departments and never reached the sales cooler at all.

This left theft as the only reasonable explanation of all the theoretically possible reasons which respondent claimed could have produced the shortages (30a, 68a, 69a, 78a, 84a, 113a-114a)

The Court of Appeals likewise made reference to a statement by petitioner's accountant Hadeler with respect as to what *could* be

the source of shrinkage in a certain week of 4800 pounds. This was in answer to a leading question of respondent, and the context shows plainly that Hadeler was referring to *theoretically* possible grounds, not *actual* grounds for the shrinkage (18c, 19c).

Also, in its discussion of the so called inventory shortage evidence, and as a further ground for its low opinion of its reliability, the Court of Appeals referred to the testimony of respondent's accountant. Certainly, the jury would not have had to believe that witness' statements in view of his demonstrated bias and self contradictions as shown by the record, even within the limitations of the trial judge's refusal to permit petitioner reasonable latitude in cross-examining him. Indeed, the jury plainly showed that it did not believe this witness by its answer to the only question it was permitted to decide involving his testimony. He had claimed that the appellant had withheld from him certain papers, books, vouchers and records, but in answer to a special interrogatory in the special verdict as to whether that was so, the jury flatly answered "No" (14a). This is a strong indication that had the jury been permitted to decide questions of creditibility on the subject of "inventory shortage" evidence and records, as between respondent's accountant and petitioner's witnesses the jury would have found in favor of the latter.

The reliability of the inventory shortage evidence, the weight to be given it and the credibility of the witnesses were all matters within the jury's province. Petitioner's witnesses had stoutly maintained that the records were accurate, complete, and showed the disposition of all product in the honest course of business. The jury had the right to believe them and accept their evidence.

It is most respectfully submitted that the Court of Appeal's comments on this evidence were not justified, invaded the province of the jury, and served only to cloud its opinion, making it more difficult to determine just what it was deciding.

APPENDIX B

ORDER DENYING REHEARING

(Filed: October 12, 1957)

The above cause coming on to be heard on appellant's petition for rehearing, and the court having requested appellee to file a reply to the petition, and appellant having thereafter filed an answer thereto, it appears that counsel for appellant ably presented the evidence and tried the case in the district court; that the result, adverse to appellant, was in no way due to any failure on the part of its counsel to exert the utmost care and effort on its behalf; and after consideration of the arguments set forth in the petition for rehearing, the reply of appellee, and the answer thereto, and the court being duly advised.

Now, therefore, it is ordered, adjudged and decreed that the petition for rehearing be and is hereby denied.

OPINION OF UNITED STATES COURT OF APPEALS

For the Sixth Circuit

(Decided June 25, 1957)

Before McALLISTER, MILLER and STEWART, Circuit Judges.

McALLISTER, Circuit Judge. The Sucher Packing Company brought suit against appellee insurance company to recover on a policy, indemnifying against loss resulting from larceny and theft by employees and any inventory shortage which the assured should conclusively prove to have been caused by dishonesty or fraud on the part of any of its employees. The case was tried before a jury, which brought in a special verdict. Appellant had sought a judgment in the amount of $146,370.57; the jury awarded $83.00.

On appeal, The Sucher Packing Company makes numerous claims of error, contending that the trial judge erred in excluding from the consideration of the jury specified records of appellant company; in restricting recovery of damages to certain losses; in submitting a form of special verdict to the jury; in directing a reading to the jury by the court stenographer, of the entire testimony of appellee's principal witness, as embodying a substantial part of appellant's claim; and in various rulings upon the admission or exclusion of testimony.

It is submitted by appellant that when The Sucher Packing Company was acquired in 1945 by a group of investors headed by Arthur Beerman, it was a successful business, and continued its profitable operations during the first part of that year, but, thereafter, began to suffer large and unaccountable losses, which continued until 1950. Appellant claims that it used many methods of attempting to ascertain the reason for such losses, including the installation of modern business record machines; the checking on weights of meat as it was processed in one place in the plant, and moved to another; blocking of unnecessary openings within the plant, and from the plant to the exterior; hiring extra guards; and employing various squads of detectives. On certain occasions, employees were found pilfering meat and were immediately discharged, but these instances were not considered of any moment.

The great losses, however, according to appellant, still continued until, on September 11, 1950, Superintendent McConkey noticed a new barrel being used on the trash truck, which was backed up to the loading dock. As only old barrels were used for trash, this incident aroused Mr. McConkey's suspicions, with the result that he inspected the contents of the barrel, and, when he looked into it, found smoked hams under a layer of trash, and also discovered fresh shoulder butts concealed in papers on the floor of the truck. The trash truck driver, William Har-

ris, was then held for investigation; and, upon questioning, he implicated four other employees, James Jackson, Robert Maiden, Helen Hurt and Willie Early. William Harris and James Jackson were arrested, pleaded guilty to grand larceny, and were sentenced to terms of imprisonment. As to Robert Maiden, Helen Hurt and Willie Early, the jury in the instant case absolved them from any acts of dishonesty, and found that no losses to appellant had resulted from any action on their part, acting either alone or in collusion with anyone else. The jury further found that William Harris and James Jackson, together, had been guilty of stealing hams, shoulders, and bacon from appellant. A most important finding by the jury in its special verdict was that there was insufficient evidence to determine any estimate of the number of pounds of hams, shoulders and bacon that had been stolen by Harris and Jackson. The method by which the jury arrived at a verdict of $83.00 in favor of appellant was as a result of finding, on the admission of the insurance company, that appellant had sustained a loss of $291.00 as a result of the thefts of Harris and Jackson, and that appellant had withheld wages owing in the amount of $208.00. Subtracting the wages withheld from the losses suffered by appellant, gave the amount of the verdict returned.

Harris, who confessed to the theft, testified as appellant's witness and stated that he had been stealing from appellant for two years. It was appellee's contention that appellant suffered no large losses as a result of thefts by employees and that Harris had been employed for only a comparatively brief period. Accordingly, on cross-examination, Harris was confronted with a statement that he had made to a detective at the time of his arrest, in which he had confessed that James Jackson "had got him to stealing hams" about three weeks before his arrest. To explain the conflict in his testimony that he had been stealing from appellant for two years, with the prior statement made to the detec-

tive that he had been stealing for three weeks. Harris stated that he meant that he had been hauling for only three weeks, instead of having been stealing for only that length of time. It was for the jury, however, to determine from the evidence whether Harris had been stealing from appellant for two years or for only three weeks. In this regard it is to be noted that Harris had testified that Helen Hurt, Willie Early and Robert Maiden were "involved" in the stealing. The jury, as mentioned, found these three to be innocent of any dishonest action, and the conclusion is inescapable that the jury attached no value to the testimony of Harris and disbelieved practically all of his testimony with regard to the time during which he had been engaged in stealing from appellant, the amount of meat that had been taken by him, and the persons he testified were involved with him.

The complaint, filed by appellant, and the numerous amended complaints subsequently filed, embodying its changing contentions during the trial of the case, foreshadow the uncertainties of appellant's claims and proofs. On September 2, 1952, the complaint was filed; thereafter, an amended complaint, and a second amended complaint were filed. The second amended complaint was amended during the trial, and thereafter again amended during the last day of the trial. The amended complaints withdrew claims of losses by theft of beef and veal from $9,620.91 to no loss whatever, of loss by theft of sausage from $12,546.74 to $10,392.74—and subsequently the claim for loss from sausage was entirely withdrawn, and, finally, complainant made an allowance for meat consumed by its employees in its cafeteria which had previously been claimed as a loss by theft. Copies of the same exhibits, twelve in number, were given by appellant to the members of the jury, in order that they could follow the testimony. These exhibits were found to contain such errors that the copies were withdrawn and

collected from the jury, and replaced by other exhibits in the hands of the jury, which were subsequently found to contain such errors, while the items were being explained to the jury, that they were also withdrawn and collected from the jury, and others submitted in their place. We refer to the foregoing as characteristic of errors and uncertainties in appellant's changing claims and proofs that took place during the trial.

It may here be remarked that appellant could not prove what part of its claimed loss took place in 1948, or what part in 1949. While it claimed that a loss amounting to $146,370.57 was due to theft, it could give no idea when during this entire period the alleged thefts occurred.

Appellant had first claimed in its complaint damages as a result of thefts of beef, veal, sausage, smoked pork and fresh pork. As to beef and veal, counsel admitted in open court that appellant could not prove such losses by theft. So beef and veal were withdrawn from the claim.

Harris testified that pork loins and sausage had been stolen by others without any certainty in amount or specification of names, but he stated that he never took anything but hams, shoulders and bacon. As a result of his testimony, counsel for appellant stated to the court: "Sausage may be eliminated as the testimony of Harris with respect to sausage is too indefinite. So the case is now restricted and confined to fresh pork and smoked pork."

Moreover, appellant, in addition to claiming that the insurance company should, according to the terms of the policy, indemnify it against loss "through theft, larceny, embezzlement, misappropriation, wrongful abstraction or fraudulent act or acts committed anywhere, by any of the employees, acting alone or in collusion with others," also claimed indemnity for "that part of any inventory shortage which the assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of its employees."

However, the proof of inventory shortage, although it appears to have been the principal part of appellant's case, was so deficient, contradictory, and worthless from the standpoint of evidence of conclusive proof of "inventory shortages caused by dishonesty of employees," that appellant, in its requested instructions to charge the jury, stated that "plaintiff is not claiming an inventory shortage . . . Under such circumstances, the portions of the policy with respect to the proof required of inventory shortages are not applicable."

The policy of indemnity insurance, as heretofore remarked, limited the insurance company's liability to $20,000 for each employee and to $20,000 for losses caused by unidentifiable employees, as well as inventory shortage conclusively proved to have been caused by dishonesty on the part of any of the employees. Appellant asked a judgment of $146,370.57, claiming, apparently, $20,000 for thefts of five employees, and the balance for thefts of unidentifiable employees and inventory shortage, caused by theft. However, at the close of the proofs, appellant submitted nine requests for special instruction to the jury, and, although it requested, in certain of them, instructions as to liability, specifically, for losses caused by the dishonesty of identifiable employees, in none of them did it request the court to charge on the liability of appellee for losses caused by the dishonesty of unidentifiable employees.

Before argument, the trial court stated that it would withdraw from the consideration of the jury appellant's claim for damages for losses sustained by dishonesty of unidentifiable employees. No objection to this action of the court was made by appellant, at that time, or after the charge to the jury, as is required if the question is to be saved for review. It is too late on appeal to complain of the action of the trial court in this regard. Moreover, it would appear from his argument to the jury that counsel

had, without objection, at least implicity, concurred in the court's withdrawal of the issue. At no time was anything said that would indicate counsel was going to rely upon the action of the court, in withdrawing the issue of losses sustained by dishonesty of unidentifiable employees, as reversible error. In his argument to the jury, counsel stated that "We are limited to only those five employees who have been identified, and I think Early was in the ring only a short period, and all we are entitled to is $20,000 for each of the employees who acted alone or in collusion with others, so that our maximum recovery cannot exceed $100,000 under the terms of the policy, even though our losses may have been considerably greater. But for the ring, four employees, during the period that they acted, we are entitled to recover at least the $80,000, and I submit, frankly, I don't believe that while Willie Early was a member of the ring, there was as much as $20,000 taken. He was a member for too short a period." This was a drop of $66,000 from the claim of $146,000 upon which appellant insisted at the trial until the arguments. The general nature of the uncertain method by which appellant's claim was sought to be proved, is evident from the argument as to Willie Early. Counsel did not think Early was a member of the ring, while as much as $20,000 worth of meat was stolen; but we are not told whether appellant's claim, as to Early, amounted to $1.00 or some amount approximating $20,000.

Appellant now claims that Harris stated specifically that he saw other unidentified employees take pork loins and sausage, and refers to this testimony as proof of theft by "unidentifiable employees," in the language of the insurance policy. But he only testified that he saw other employees take pork loins—not unidentifiable employees; and even this is indefinite, with no names, nor amounts taken. With this fragment of evidence as to unidentifiable em

ployees, it would be easy to understand appellant's abandonment of that phase of its claim.

The foregoing, then, discloses that appellant first withdrew all claims for losses by theft of beef and veal, because it could not prove them. It then withdrew all claim for losses by theft of sausage, because it could not prove them. It then, in effect, withdrew all claims for losses by theft caused by unidentifiable employees as a class, because it could not prove them. It finally withdrew all claims for inventory shortage caused by dishonesty of employees, because it could not prove them. Its final claim was limited to losses allegedly caused by the theft of meat to the amount of $20,000 each, by Helen Hurt, Robert Maiden, Willie Early, William Harris and James Jackson.

The jury found in its special verdict, as above mentioned, that Helen Hurt, Robert Maiden and Willie Early had not stolen anything. As to William Harris and James Jackson, the jury found that while they had stolen pork meats, there was insufficient evidence to enable the members of the jury to make any finding as to the number or approximate number of pounds of meat stolen by them; and as to James Jackson, the jury found that his theft had occurred September 11, 1950; and, as to Harris, that his thefts had occurred between July 26, 1950 and September 11, 1950 — a period of between six and seven weeks. It is impossible that these two employees during such a short period, could have stolen more than a small amount of meat.

Upon an examination of the record, it is clear that the verdict of the jury was justified by the evidence. The jury obviously refused to give any credence whatever to the testimony of William Harris, except where it was not in dispute; and, as the trial court charged, the jury is the sole judge of the credibility of witnesses.

One of the chief claims of error made by appellant is that the district court excluded from the consideration of

the jury the records of appellant which it had introduced to show an inventory shortage. It was admitted by appellant, at the close of the proofs, that it was not claiming an inventory shortage, "caused," in the language of the insurance policy, "by dishonesty or fraud on the part of any of the employees." In keeping with appellant's proposed instruction setting forth that it was not claiming an inventory shortage, the trial court gave the following special instructions to the jury:

> "[In] your consideration of this case and endeavoring to arrive at a conclusion, you are not to consider the evidence of an inventory shortage.
>
> "I realize we have been here a number of days hearing evidence on the question of inventory shortage, and it is necessary that the Court hear all the evidence. It becomes necessary for the Court to determine as a matter of law, whether that presents a factual question which may be considered by the Jury.
>
> "So, the Court has determined, as I say, that in arriving at your verdict, you will not consider this evidence of inventory shortage. In other words, it cannot be used by you as any measure of determining any loss to the plaintiff."

Accordingly, exhibits taken from appellant's records showing the disposition of product through its plant, the detailed daily and weekly figures from three large packing cases of primary data, folders of Weekly Products Analysis Sheets, stock records, and the various computations made from the foregoing, as well as the exhibits offered on the same subject, were withheld and not submitted to the jury. This is claimed to be reversible error.

When the trial court instructed the jury that they were not to consider the question of inventory shortage in determining losses of appellant, this seemed to be in agreement with the recital in appellant's proposed instruction that it was not claiming an inventory shortage. Appellant now says, however, that the court's instruction on this point

constituted reversible error because it should have instructed the jury that it could consider the claimed inventory shortage, as corroborating direct evidence of appellant's loss by theft, or as stated in appellant's reply brief, "to assist [the jury] in determining the amount of appellant's loss." If the district court's instruction, in this regard, was erroneous, it certainly was not plain error, and appellant was obliged, in order to save the question for review, to except or object to it, in order to call the court's attention to any misstatement or oversight and to give an opportunity for correction. Counsel for appellant did except to the instruction, but in the following language: "Also, take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered in describing the inventory shortage." This, obviously, was not an objection or exception calling the court's attention to the claim now made by appellant that the books should have been admitted to corroborate proof of theft. The exception was that the books "should not be considered in describing inventory shortage." Appellant had informed the court in its proposed instruction that it was not basing its case on the theory of inventory shortage, and all that the court told the jury was that they could not consider evidence of inventory shortages in determining any loss to appellant. It would have been improper, after such an instruction, for the court to have charged the jury that it could consider the claimed inventory shortage in order to assist it in determining the amount of appellant's loss, as that would have permitted the jury to consider the inventory shortage as proof of loss to appellant by reason of the theft of employees, and appellant agrees that such proof, under the indemnity policy, must constitute "conclusive proof" of such dishonesty, which it conceded that it failed to adduce.

Appellant further submits that the district court at the outset of the trial, specifically stated that "exceptions are not necessary," thus seeking to justify any failure to except to the charge to the jury. The court's ruling, however, that exceptions were not necessary, was made with regard to exceptions during the progress of the trial. Formerly, counsel were obliged not only to object to such matters as rulings of the court on the admissibility, or nonadmissibility of evidence, but it was also required to except to the rulings of the court during the trial, in order to save the question for review. Such requirement has been discontinued. Rule 46 of the Federal Rules of Civil Procedure. However, it is still necessary to object or except to instructions of the court to the jury. Rule 51 of the Federal Rules of Civil Procedure. Thus it is seen that the remark of the court, that no exceptions were necessary, related to rulings during the trial, and had no application to the requirement that a party must except or object to the court's instructions to the jury in order to save the question for review. We fail to see where the court was in error in its instructions, or that any exception was made by counsel for appellant that would call the present claimed error to the court's attention, and we find no merit in appellant's contention in this regard.

Even if appellant had requested the court to charge that its records showing inventory shortage could be considered by the jury as corroborating the direct evidence of appellant's loss by theft—and had duly excepted to the failure of the court so to instruct—it is doubtful that the court's refusal to give such requested instruction could be considered error under the circumstances of this case. Plaintiff's proofs of inventory shortage, and the records and computations made by them for the purpose of such proof, are uncertain and deficient. As an instance, shrinkage, or loss of the weight of meat, was one of the principal items

with which the case was concerned. As testified by the superintendent of appellant company, "shrink' is one of the bugaboos of the meat industry. It depends on many factors. The conditions existing in a particular plant affects shrink, and among these factors are temperature, air-circulation, relative humidity in the cooler, position of vat covering, frequency with which the door of the cooler is opened and closed, removal or addition of hot carcasses and the type of breed of animal—whether lean or fat." Records for humidity and temperatures of appellant's plant during the critical years were missing, and apparently, no record was ever made as a result of any actual test of shrink at the plant.

Furthermore, when the accountant for appellee asked appellant company for the general ledger, general journal, journal vouchers, audit work papers, records covering temperature, humidity, changes of air, and circulation, they were not available. Appellee's accountant further testified that the product analysis sheets, upon which appellant so completely relied, contained round numbers and approximation of weights, that "product transfers-out" in round numbers, from fresh pork, affected the balance remaining, or supposed to be remaining, in fresh pork, that if the one item was wrong, the other would be wrong, that the use of round numbers was incorrect because it was not an exact weight, and the result would be that the amount of fresh pork remaining on hand would not be exact and accurate, that the product analysis sheets showed no allowance for any shrink, that the several million pounds of meat were held in inventory, during the critical years, for at least two days, in which there should have been additional shrink computed, but that none of these items were reflected on the product analysis sheets, that in none of the papers or records submitted by appellant was there any statement by any officials, employees, or counsel of appellant company as to any loss by shrinkage, mistake,

or theft, except in connection with the original chilling shrink; that lard appeared nowhere on appellant's exhibits, and that, as an accountant, it was impossible for him to take the records, and to trace out and say what should have been on hand.

There are multitudinous errors and uncertainties in appellant's records and its proofs of inventory shortages. As an instance, for the week ending October 1, 1948, there was a shortage of pork of 18,245 pounds, which was unexplained. It was claimed that if an error was made, it would straighten itself out in the following week, but, on October 8, 1948, the next week, the shortage was 14,313 pounds, which, the vice-president of the appellant company said, no doubt, caused a lot of concern. For the week ending June 11, 1949 there was a shortage of 16,555 pounds of meat, which no one could explain. It was not claimed that more than 8 tons of meat were stolen during that week. For the week ending July 2, 1949, there was a gain of meat, on the records, in the amount of 6,000 pounds, although nobody had brought that amount of meat to appellant's plant. On October 22, 1949 there was a shortage of 1,811 pounds of sausage, but the plant officials did not think that any of the employees had stolen it. When appellant's claim was first submitted to the jury, appellant had forgotten to deduct from its claim of stolen meat, a large amount that had been supplied and consumed by its employees, in appellant's cafeteria. As to the claim that when a shortage appeared on the books, it indicated a theft, on one of the inventory statements it appeared that there had been a shortage of 5,544 pounds of offal in a certain period. Yet no one claimed that anyone was stealing offal. In view of appellant's claim that Harris, Jackson, and the ring were responsible for the great losses suffered by appellant as a result of their thefts, a remarkable circumstance is seen in the shortages after Harris and

Jackson were arrested, and the others dismissed. When it was then assumed that the cause of shortages had been found, and those responsible arrested or discharged, it appears from the work-sheets of the certified public accountant, employed by appellant to determine the extent of unexplained losses, that on September 16, 1950, the week after Harris had been arrested, the shortage for that week was 11,000 pounds. On September 25 there appeared a shortage of 3,700 pounds and on September 30, 6,600 pounds—none of which could be attributed to thefts by Harris, Jackson and "the ring." It seems significant that Mr. Hadeler, the accountant employed by appellant to determine the extent of the unexplained losses, testified that: as an example, an item of shrinkage of 4,800 pounds in a certain week could come either from errors in transfer or in taking the inventory, an additional shrinkage because the meat had stayed too long in storage, or through spoilage; or, finally, from theft.

In spite of all the complications in the proofs, the trial court summed the case up tersely and clearly when, in a colloquy with appellant's counsel, he said that the question of losses was one that was capable of mathematical demonstration to the jury or anyone else, and depended on accurate inventories at the beginning, accurate inventories at the end, and the accuracy of incoming and outgoing items.

The records contained too many errors, uncertainties and approximations to enable a jury to draw any conclusion except unwarranted speculation, from them, in arriving at an inventory shortage conclusively proving losses caused by the dishonesty of employees. The claimed inventory shortages would seem to be equally valueless to corroborate proof of thefts by individual employees. But, in view of what has heretofore been said, we are not obliged to pass upon this latter point.

With regard to appellant's claim of error, we find nothing objectionable in the court's submission to the jury of the form of special verdict. It was not subject to any valid complaint that the jury was required to find the specific details of damage with precision, as the jury was instructed that it was not necessary to find the amounts of the various items with perfect exactitude, or with precise mathematical calculation, but only that there must be some basis for computation that would reasonably afford them an opportunity to arrive at some figure that approximated correctness.

As to the direction by the trial judge to the court stenographer to read all of William Harris' testimony to the jury, as an introduction to his charge, we find no error. Three weeks of trial had elapsed since Harris had testified, and since appellant's case largely depended on the testimony of Harris, the trial judge, as he said to the jury, "in fairness to you, in order that you may be better able to understand the case and the charge and the work you will have to do," directed the reading of the entire testimony of Harris to the jury. We see no prejudice to appellant in this method of procedure of the trial judge.

Appellant further claims that the court was in error in not permitting a third person to testify as to what James Jackson admitted with respect to stealing from appellant, at the time he was arrested. Jackson was called as a witness by appellant, but refused to testify as to having admitted that he was guilty of stealing, on the ground of possible self-incrimination. Appellant then sought to prove by the third party that Jackson had admitted that he had been stealing from appellant, claiming that such a declaration on his part would be against interest, and therefore was properly admissible in evidence. The trial court held that Jackson was not a party to the case, and that it would have to be satisfied by some authoritative adjudication on

the point, before ruling in favor of appellant's contention. Failing, apparently, to be furnished with such authority, the court ruled that the testimony concerning the alleged statement made by Jackson to a third person, was inadmissible. Such ruling was consonant with the decision of the Supreme Court in *Donnelly* v. *United States*, 228 U. S. 243, where, however, there was a strong dissenting opinion by Mr. Justice Holmes, concurred in by Mr. Justice Lurton and Mr. Justice Hughes. It might well be, as appellant argues, that, in the light of adjudications during the 44 years that have elapsed since the *Donnelly* case, the views once voiced in the prevailing opinion in that case, would no longer hold, and a declaration against interest such as was here sought to be introduced, would be held admissible. Moreover, the rule in the *Donnelly* case may not be applicable to other than criminal cases, for a distinction has been drawn between statements subjecting the declarant to a criminal liability, and a statement against the declarant's pecuniary or proprietary interest, the latter kind of statement, in many cases, being considered admissible as a declaration against interest, while the former is not. Here, the alleged statement was against the pecuniary interest of the declarant, since presumably, he would be liable in a civil action for what he stole. Yet it would also be a statement which might subject him to criminal liability, and it is to be noted in this regard that Jackson refused to answer the question as to whether he had been stealing during the period in question, on the ground that his answer might be self-incriminatory. However, in the recent case of *G. M. McKelvey Company* v. *General Casualty Company*, 166 O. S. 401, decided May 29, 1957, it was held that where an insured brought a civil action against his insurer to recover for defalcation of employees of the former, and it appeared that such employees had been summoned, but had not been found in the jurisdiction, written and signed

confessions of such employees were admissible in evidence as declarations against interest as to both the fact and the amount of the loss. At the time of the trial, in the instant case, when the question as to the admissibility of such evidence arose, the trial court was well advised in requesting counsel for appellant to furnish him authority on the proposition. In any event, if it be assumed that it was error to hold as inadmissible the evidence that Jackson had told a third party that he had been stealing from appellant during the period in question, we do not consider that such ruling constituted reversible error in this case, in view of the evidence of all the various instances where the losses occurred; the many ways in which errors were made in computations by appellant; the deficiency in proof as to what was stolen, or how much was stolen; and the obvious refusal of the jury to attach any credit to appellant's evidence of losses of hundreds of thousands of pounds of meat by theft, by all the employees accused by appellant; for no error in the exclusion of evidence is ground for setting aside a verdict or for vacating a judgment, unless it is inconsistent with substantial justice. Rule 61 of the Federal Rules of Civil Procedure.

Other claims of error have been considered, but have been found without merit.

In accordance with the foregoing, the judgment of the district court is affirmed.

LIBRARY
SUPREME COURT

No. 716

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 716

THE SUCHER PACKING CO.,
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MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Instead of arguing the four questions argued by the Petition for Certiorari, respondent denies such questions are raised by the record, and then sets up what it claims are the only two issues raised by the record, the first of which, however, bears out that a factual question was taken away from the jury and actually is respondent's own inverted self-deciding variation of Petitioner's Question 5, which was stated but not argued in the Petition for Certiorari; and the second of which relies partly on assertions not supported by the record and is not the basis of any ruling of either of the court below.

As to the respondent's claim that it was not served a copy of the record filed in this Court, the Rules of this Court state (Rule 21, paragraph 1) that the petitioner is not required to serve on the respondent a copy of the record to be filed in this Court on a Petition for Certiorari (presumably because the respondent already has such a record from his participation in the proceedings in the Court of Appeals), but only that the respondent be notified on the form supplied by the Clerk of the contents of the record filed in this Court (Rule 21, paragraph 2). This was done. As to respondent's allegation that petitioner's record references do not support statements for which they are given, respondent fails to give a single example to bear out such a contention.

RESPONDENT'S QUESTION 1

The claimed factual statement made by respondent to support its first question shows only what petitioner has itself always insisted, i.e., that as between petitioner and respondent there was a sharp disagreement as to the weight and credibility that should be accorded to petitioner's records and "inventory shortage" evidence. It was up to the jury, however, to make the necessary resolutions of credibility and determinations of the weight of the evidence. This the jury was not permitted to do.

Reply to Respondent's Contentions on the Facts Point By Point.

1, 2, 3 and 4. Respondent claims six possible causes, including theft, for the "unexplained" loss experienced. These were theoretical possibilities only, but on the evidence, all of these possibilities except theft were eliminated:

a. It was mathematically demonstrated that any possible errors in weekly inventories cancelled each

other out; that instead of taking the algebraic sum of the "shrinks and gains" from the weekly product analysis sheets, as was done for convenience, they could have been ignored entirely, and instead, exactly the same results would have been obtained by adding to the opening inventory for the entire period the purchases and the sum of all the charge-ins and then subtracting from that total the sum of all the charge-outs, the sales and the closing inventory for the period.[1] Even any possible errors in the opening and closing inventories for the entire period would have had only a negligible effect on the results, because they would have had to be so small compared to the tremendous flow of millions of pounds of product through the plant over the entire periods.[2]

(b) Possible errors on transfers were likewise negligible. Round numbers used, as was customary in the industry, produced no practical error, because they were very close to mathematical accuracy in the first place, and because of the large numbers of transactions involved, on actuarial principles any slight "overs" would balance out similar "unders", leaving no net resulting error.[3]

(c) Spoilage could not have produced error, because spoiled products were not discarded, but transferred to lard if still so usable, or to tankage, and in either case such transfers were recorded and credited.[4]

(d) There was no evidence of any uncorrected mistakes. Respondent's reference to an excerpt of testimony at 26b-27b failed to include the immediately

[1] 59a, 60a, 63a, 64a-66a, 73a-75a, 86a, 96a-97a, 100a-101a, 120a, 122a-123a, 8c, 19c.
[2] 73a-75a, 76a-77a, 86a-87a, 8c.
[3] 27a, 62a-63a, 66a, 99a, 111a, 124a-125a, 139a-140a, 143a.
[4] 27a-28a, 70a, 92a, 25c, 29c-30c.

following testimony which appears at [illegible] and shows that the alleged mistake was one that had been corrected. Respondent's own auditor who had spent weeks going over the petitioner's records, could not find a single mistake.[5] Petitioner's auditor was likewise satisfied with the accuracy of the records.[6]

(c) Petitioner allowed more than adequate factors for natural shrink.[7] Respondent's own auditor conceded that in its claim petitioner had allowed for the sum of the two periods of the claim almost a million pounds for natural shrink of fresh pork[8] and almost two hundred thousand pounds for natural shrink of sausage alone.[9]

(d) This left theft as the only reasonable actual cause of the six original theoretically possible causes which respondent claims could have been responsible for the unexplained loss.[10]

5 Shrink tests were in fact made at petitioner's plant.[11]

6 An auditor's inventory at the close of a fiscal year was produced, to wit: the opening inventory of the week ending November 5, 1949.[12]

7 It was never contended that all stealing stopped when Harris and his confederates were caught.[13] Certainly petitioner still keeps records of shrinks and gains as part of good accounting and product disposition control.

8 While petitioner could not find a record of the exact amount of meat given to the employees' cafeteria for the period of the claim, a generous allowance was

5 177a-178a
6 19c-20c
7 29a, 32a, 53a, 54a, 55a, 57a-58a, 103, 104, 136a, 147a-148a; Ex. 231a; Ex. 21, 241a; Ex. 25, 247
8 172a-173a
9 175a
10 30a, 51a, 68b-69b, 78b-84, 113a-114a, 117a
11 29a, 52a, 54a, 22c, 23c
12 8c-9c, 12c-13c; Ex. 4, [illegible]
13 94a-95a

made in the claim for this item, based on the number of employees involved and subsequent records of actual meats so consumed.[14]

9 Of course petitioner cannot say how much any particular person stole, as a ring of thieves and other employees unidentified were responsible for the thefts. Petitioner claimed only the total attributable to all these causes together and not to any individual thief alone.

10 There is no evidence whatever, and respondent cites none, to the effect that no credit was allowed for the weight of gambrels. In fact, although the question was not raised at the trial by respondent, or anyone else, scales were adjusted to eliminate the gambrel weights when the "hot weight" was recorded.

11 Naturally there were no reports of anyone's stealing prior to Harris' apprehension, because before that time how the large scale thefts were being accomplished and by whom was not known. However, before that time there were some instances of dishonesty discovered.[15]

12 While it is true that temperature, refrigeration, air circulation, humidity, source and feeding have a very slight effect on the amount of natural shrink, those factors were favorably controlled at petitioner's plant and were included in the percentage allowed by petitioner for natural shrink.[16]

13 It was only Harris' permanent employment that began on July 26, 1950. He was previously employed fairly regularly as a spot laborer.[17]

14 There is no evidence on the record that Jackson made a written statement to anyone. Petitioner at no time refused to produce any written statements from anyone which it had in its possession. The record reference cited

[14] 99a
[15] 41a, 42a, 61a, 130a, 131a
[16] 11c, 25a, 28a-31c
[17] 17a, 101a-102a, 141a, 215a-216a

by respondent, i.e., 17b; was a request by respondent for written statements, including one supposedly made by Jackson as to the existence of which there was no evidence, which request was made after the case was closed and the trial court had already instructed the jury before argument. It was obviously a brazen theatrical gesture for the jury's benefit, and was promptly overruled by the trial judge within seconds—even waiting to hear from petitioner's counsel.[18]

15. Sales of whole dressed hog shipments were included in petitioner's computations and resulted in a much larger normal shrinkage allowance than respondent was entitled to, because even though such hogs were not subject to cutting shrinks or sales cooler shrinks, petitioner allowed the same full percentage of natural shrink on the whole hog shipment weight as on the cut up fresh pork.[19] Petitioner did in fact produce invoices for approximately six million pounds of dressed hog shipments, but respondent refused them, and likewise did not accept petitioner's offer to permit respondent's accountant to examine them and all other invoices of petitioner.[20]

As to bone removed from hotel cuts, that would have been handled by petitioner's separate fabricating department.[21] Petitioner's accounting department, not the witnesses referred to by respondents, had such records. Moreover, the amount of such bone was irrelevant because under petitioner's accounting system it would already have been credited to fresh pork when the meat which included such bone was cut from the whole dressed hog and sent to the fabricating department. Furthermore, even then there would have been a record of the weight of the bones

18 210a.
19 51a, 54a, 58b, 93a, 171a; Ex. 9, 231a; Ex. 21, 241a; Ex. 22, 242a, 58b, 30, 40.
20 32a.
21 166a-171a.
21a 23a-24a.

themselves because they would have been weighed on transfer to tankage.[22]

16. Respondent cites no record reference to the claim of spoilage and as is shown above (page 3, subparagraph (c)) spoilage could not have been a factor.

17. Understandably, respondent cites no record reference for this numbered contention, because no one knows what Jackson did or did not observe, since he refused to testify as to any of his activities, under protection of the Fifth Amendment.

The foregoing replication to respondent's factual contentions point by point as to what the evidence did or did not prove, delineates the sharp difference of opinion between petitioner and respondent on the weight and credibility of the evidence and the witnesses with respect to the subject of petitioner's records and "inventory shortage". As shown above, petitioner's witnesses stoutly maintained that the records were accurate, reliable, and showed conclusively the disposition of all product in the honest course of business and the disappearance of product the only explanation for which was dishonesty. Respondent claimed to the contrary. It was, therefore, for the jury and not either the trial or appellate court to determine weight or to resolve credibility.

As we should like to confine ourselves in this Reply Brief to the issues argued in the Petition for Certiorari we do not wish to take much space at this time (but will develop the point more fully on the merits if the Petition is allowed) to show the lack of justification for the trial court's exclusion of, and the Court of Appeals' disparaging unfavorable comments to, petitioner's evidence, which were the main subject of respondent's brief. Suffice it to say, analogous evidence no stronger than as strong was held a proper basis for recovery in actions on similar insurance policies

[22] 4.

in *New Amsterdam Casualty Company* v. *W. D. Felder & Co.*, 214 F. 2d 825 (C.A. 5, 1954) and *Morrow Retail Stores, Inc.* v. *Hartford Accident and Indemnity Co.*, 111 F. Supp. 772 (D.C. Idaho, 1953).

Moreover, since the fact that petitioner had been damaged to some extent was definitely established by the direct evidence of theft, the proof of the amount of such damage (the "inventory shortage" evidence offered to corroborate this direct evidence) did not have to be certain. *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S., 680 (688), 66 S. Ct. 1187, 90 L. ed. 1515 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. ed. 544 (1931); *Palmer* v. *Conn. Railway and Light Co.*, 311 U.S. 544, 559, 61 S. Ct. 379, 85 L. ed. 336 (1941); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406-408, 60 S. Ct. 681, 84 L. ed. 825, 834, 835 (1940); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. ed. 652 (1946).

Speculation or unwarranted inferences could arise only if one refuses to believe petitioner's witnesses and accepts respondent's argument. Evidence is speculative or requires inferences not allowed in law, if the evidence adduced permits equally probable conflicting inferences to be drawn therefrom, and there is no evidence which would justify a choice of one inference over another. That is the principle for which the cases cited by respondent on page 7 of its brief stand. However, in the case at bar, there is direct evidence of theft and a conflict as to the reliability of the records and evidence, offered in corroboration of the direct evidence to help show the amount of the loss. If petitioner's witnesses were to be believed, such records were accurate and reliable. Respondent claimed otherwise. It was for the jury to decide what weight should be given that evidence and whom it wished to believe. Here there was not simply evidence from which

several conflicting inferences of equal probability were possible with no other evidence which would justify the jury in selecting one inference rather than another. Here there was just such evidence, if the jury chose to believe it, and it was solely the jury's prerogative to make the choice. That evidence would have logically required the jury to select the one inference, to-wit, theft by employees, over any other possible inferences which might have been made in the absence of choosing to believe such evidence. However, the jury was not permitted to make that choice when the evidence was withdrawn from its consideration.

THE ISSUES RAISED BY THE PETITION FOR CERTIORARI WERE ON POINTS OF DECISION BY THE COURT OF APPEALS

Respondent, knowing this Court's reluctance to weigh evidence, has sought to make it appear that "solely an analysis of the evidence" was involved below. There is no gainsaying that the Court of Appeals did seriously disparage the petitioner's evidence (even though in so doing it invaded the jury's province). However, that court made it plain it was not basing its decision on its poor opinion on the evidence, but on the legal questions raised in the Petition for Certiorari.

Petitioner's Question 1 was Raised by the Opinion Below.

With respect to the withdrawal of the "inventory shortage" evidence which petitioner claimed should have been admitted to corroborate the direct evidence of theft, the Court of Appeals said (references are to pages of Appendix B to the Petition for Certiorari, where its opinion is set out in full) at page 39:

> If the district Court's instruction, in this regard, was error, it certainly was not plain error, and *appel-*

lant was obliged, in order to save the question for review, to except or object to it, in order to call the court's attention to any misstatement or oversight and to give an opportunity for correction." (Italics added.)

and again at page 40:

"Appellant further submits that the district court at the outset of the trial, specifically stated that 'exceptions are not necessary'; thus seeking to justify any failure to except to the charge to the jury. The court's ruling, however, that exceptions were not necessary, was made with regard to exceptions during the progress of the trial. Formerly counsel was obliged not only to object to such matters as rulings of the court on the admissability, or nonadmissibility of evidence, but it was also required to except ~~to~~ the rulings of the court during the trial, in order to save the question for review. *Such requirement has been discontinued. Rule 46 of the Federal Rules of Civil Procedure. However, it is still necessary to object or except to instructions of the court to the jury. Rule 51 of the Federal Rules of Civil Procedure.* Thus, it is seen that the remark of the court, that no exceptions were necessary, related to rulings during the trial, and *had no application to the requirement that a party must except or object to the court's instruction to the jury in order to save the question for review.*" (Italics added.)

and finally at page 43:

"The claimed inventory shortages would seem to be equally valueless to corroborate proof of thefts by individual employees. *But in view of what has heretofore been said, we are not obliged to pass upon this latter point.*" (Italics added.)

These excerpts plainly show that the Court of Appeals was basing its negative answer to Petitioner's Question 1, not on its poor opinion of petitioner's evidence but on

its holding that different standards apply to Rule 51 from those applied to Rule 46. The Court of Appeals completely ignored that under the provisions of Rule 46 itself, exceptions are not necessary when and because the complaining party has already made its position clear to the trial court or has not had the opportunity to do so, and refused to apply the same principle to Rule 51.

Annotators So Construe the Opinion Below

Not only petitioner but the annotators to the Federal Rules likewise so understand the Court of Appeals decision. *28 USCA, Rules 17 to 51, 1957, Cumulative Annual Pocket Part*, note 9, page 346, under Rule 46; note 2, page 377, and note 11, page 393 under Rule 51. This makes a corrective decision by this Court all the more necessary.

Petitioner's Question 2 Was Squarely Raised by The Opinion Below

The portion of the Court of Appeals' opinion appearing at pages 38-39 of appendix B to the Petition for Certiorari blames the trial court's instructions before argument, removing "inventory shortage" evidence from the case, on a proposed special charge submitted by petitioner, and at pages 35-36 ruled that petitioner in argument to the jury acquiesced in the trial court's exclusion of loss from unidentified employees. It failed to recognize that that special charge was such a modification of one previously prepared, and that petitioner's argument to the jury was so tailored, in order that both should conform to the trial court's still earlier announcement of its rulings excluding such evidence and such issue, which were the rulings later repeated in its instruction before argument. (See pages

8-9, 15-16 Petition for Certiorari). The same applied to the excerpt from petitioner's argument to the jury quoted on page 6 of respondent's brief. Petitioner's plea that it had merely sought "to win a verdict if he could within the narrower borders of the case that the judge had laid down for him", as permitted by *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (CA 2, 1952), cert. den. 343 U.S. 966, 96 L. ed. 1363, 72 S. Ct. 1061, was unavailing in the Court of Appeals below. Thus the portions of the opinion of that court just referred to clearly raised Question 2 in the Petition for Certiorari, and Annotators to the Rules of Civil Procedure also so understand. *28 USCA, Rules 17 to 51, 1957 Cumulative Annual Pocket Part*, note 8, pp. 389-390, under Rule 51.

RESPONDENT'S QUESTION 2

As shown in paragraph 14, page 5 *infra*, there is no evidence in the record that Jackson ever made a written confession to anyone, and petitioner's counsel at no time refused to produce any written statement from anyone.

Detective Merica's interrogation of Jackson, in which Jackson admitted that he had been stealing from petitioner for five years, occurred the very morning that Harris was caught red-handed with a load of stolen meat on the trash truck, and after Harris had implicated Jackson as the head of the ring.[23] Jackson's admission that he had been stealing from the petitioner for five years, could have had reference only to the theft of meat products of the kind found in Harris' truck. That was the only subject of the interrogation. It would be ridiculous to suppose that Jackson's admission had reference to anything else. In conversation, one does not repeat everything that has been said before as a preface to each sentence

Jackson had been talking to Merica about the theft of meat products, so when he admitted he had been stealing from petitioner for five years, the only reasonable interpretation to be given to his statement was that he had been stealing such meat products.

Moreover, the trial court having excluded that testimony, respondent was not obligated to ask further questions on details of the thefts which would also be excluded, just to make a record. Once testimony of a certain type is excluded and the record made to show that exclusion, the aggrieved party is not obligated to pursue further details of that line of testimony with additional questions and proffers. *McCandless* v. *United States*, 298 U.S. 342, 347, 80 L. ed. 1205, 56 S. Ct. 764 (1936).

Obviously, if Jackson had been stealing from petitioner for five years, up to the time he was being questioned by Merica, that span would include the last two years of the five, which was the period involved in this case. (Unfortunately for petitioner it had only begun to keep sufficient detailed product disposition records at the beginning of the two year period involved in this case.)

The cases cited by respondent forbidding inference on inference and mere speculation have no application to the jury's right to interpret reasonably what a witness means by a statement and to draw reasonable inferences from such interpretation. Practically every statement by any witness in any case requires some interpretation as to its meaning by the jury before the latter can proceed to draw primary inferences, which is its duty in every case.

The opinion of the Court of Appeals (pages 45-46 of Appendix B to Petition for Certiorari) shows that that court did not accept respondent's argument on the admissability of Jackson's statement to Merica, but rather left unanswered Question 3 and ruled adversely to peti-

tioner on Question 4 in the Petition for Certiorari, all as set forth at pages 18 to 25 of the Petition.

CONCLUSION

Respondent's brief has left the first four questions argued in the Petition for Certiorari undisturbed and still urgently needing a decision by this Court to resolve conflict among the Circuits and to settle important questions of interpretation of Rules 46, 51 and 61 of the Rules of Civil Procedure and rules of evidence in the federal courts. Respondent's brief has, however, served to emphasize the failure of the Court of Appeals itself to answer, or to disturb the erroneous manner in which the trial court answered, Question 5 of the Petition for Certiorari, because of the manner in which the Court of Appeals answered Petitioner's Questions 1 and 2.

For the reasons stated in the Petition for Certiorari it is respectfully submitted that it should be allowed.

Respectfully submitted,

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No. 710

In The

United States Supreme Court

October Term, 1957

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1957

No. 716

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent has filed as its second brief what it terms a "Reply Brief," not to answer any new matter raised in the Reply Brief previously filed by petitioner, but apparently as additional argument in opposition to the argument originally made in the Petition for Certiorari. This Supplemental Reply Brief of Petitioner is to answer claims in Respondent's "Reply Brief," and is necessary because of the impropriety of respondent's statements.

ARGUMENT

Reference to Alleged Written Confession of Jackson Is Highly Improper

Respondent purportedly quotes from what it claims was a written confession of Jackson. This effort by respondent is highly improper as no such document was ever even so much as identified, much less offered in evidence. If Jackson ever made a written confession, it was never pro-

duced by respondent or anyone else in the court room. Since respondent claims in its "Reply Brief" that it had possession of such a document, if it wished to refer to the same in argument, it surely was its duty to have produced it and offered it in evidence at the trial. Not having done so, it would not be permissible for respondent even to refer to it in this Court, but to go further and purportedly quote from such an alleged document, which is nowhere in the record, is quite improper.

Moreover, such reference by the respondent is also otherwise irrelevant, because the declaration by Jackson to Merica that he had been stealing from petitioner for five years was never claimed to have been in writing. Criminals will often balk at putting in writing what they have said orally, particularly if the same is seriously incriminating.

Reduction of Petitioner's Claim

Surely, petitioner is not subject to criticism for having reduced its claim in filing several amended complaints by eliminating amounts it had earlier included through mistake of its counsel. Nor was it reprehensible for petitioner to have withdrawn claims for loss of beef and veal just before the trial started because of difficulties of proof. For the trial petitioner had reduced its claim to those items and to those amounts it believed it could legally prove. If anything, such reduction and elimination was to petitioner's credit, not discredit.

Consistency of Petitioner's Position

Respondent's rhetorical questions are misleading or without foundation. Once the trial started, petitioner's position was consistent throughout. While petitioner's counsel did revise certain exhibits showing computations, such revisions

were necessary to be consistent, by eliminating items which had been dropped before the trial started. Petitioner at all times steadfastly claimed that the "inventory shortage" records and evidence should go to the jury and that petitioner's claims for loss from unidentified employees, including sausage, were valid, until the trial judge overruled petitioner. The excerpt from petitioner's counsel's argument to the jury quoted by respondent was simply an effort by petitioner to salvage what it could under the judge's ruling with the least damage to itself in the eyes of the jury, or in the words of Judge Learned Hand, "to win a verdict if he could within the narrower borders of the case that the judge had laid down for him."

The isolated excerpt out of context from petitioner's counsel's argument opposing respondent's motion for a directed verdict, only shows counsel's efforts to convince the trial judge that petitioner still had enough of a case to go to the jury even if the judge withdrew the records.

There is not the remotest suggestion in the evidence that petitioner threw away any inventory or product disposition records during the pendency of the case.

The $291.00 referred to by respondent represented only that negligible number of pieces of stolen meat which respondent was willing to admit could still be physically identified in the hands of purchasers from Harris.

Speculation Not Required

Cases cited by respondent that a jury may not be permitted to speculate between several possible causes of loss of equal probability are not applicable here, because here, as has been shown in our earlier briefs, if the petitioner's witnesses were to be believed, and the jury had the sole right to determine their credibility, the only reasonable explanation for the "unexplained loss" was employee dishonesty.

CONCLUSION

It is hoped that the Court will not be misled by the respondent's attempted obfuscation and diversionary tactics. In neither of its briefs has respondent attempted to deny the factual basis for the questions presented in the petitioner's petition or to defend the Court of Appeals' rulings on those questions. Instead respondent has sought to raise other issues as a diversion.

For the reasons stated in the petition, it is earnestly urged that the Petition for a Writ of Certiorari be allowed.

Respectfully submitted,

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No. 716

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.,

Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

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MANUFACTURERS CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

It appears that petitioner contends that having allegedly made its position clear it was not necessary to thereafter object under rule 51, 28 USCA but an examination of the notes of decisions under rule 51, 28 USCA at page 524, note 1, and the Cumulative Annual Pocket Part 1957, page 377, notes 1 and 3, discloses that the decisions amply support the requirement that it is the duty of counsel under rule 51 to state distinctly the matter to which he objects and the grounds thereof under the facts in this case.

ARGUMENT

PETITIONERS POSITION

In the cases cited by petitioner in support of its claimed conflict under rules 46 and 51 of the Rules of Civil Pro-

cedure it is noted that counsels position in the cited cases remained firm and consistent at all times. In the instant case what was Petitioners position? Was it that taken by Petitioner when it modified its special charges to comply with the announced views of the trial court? Was it the one taken when Petitioner said to the Jury:

> (726) "and I may say to you also, in consideration of the case, at this point, sausage may be eliminated as the testimony of Harris, with respect to sausage is too indefinite. So, the case is now restricted and confined to fresh pork and smoked pork."

Was it the position taken when demand was made upon Petitioner under the Discovery Rules for the production of the employment records of William Harris and Petitioner produced what it represented to be such work record showing Harris' employment commenced July 26, 1950, six weeks before Harris was apprehented, and at the trial produced additional records purporting to show a prior employment date (31b, 32b).

Was it that taken when Petitioner conceded its inventory records were not essential when it said:

> "* * actually we would not need to show the computation of excess shrinkage in this case to present to the jury sufficient for them to consider to arrive at a verdict. They could take Harris' testimony and could compute and arrive at a figure of how much was taken and the value of it. * * *"

Was it that taken when Petitioner allegedly threw away its records during the pendency of this action?

Was it that taken in its attempt to have detective Merica testify that Jackson stated he had been stealing from petitioner for five years wholly disregarding Jackson's written confession taken by detective Merica that Petitioner had forwarded to Respondent which reads as follows:

"This statement taken by F. E. Merica of the Merica Detective Bureau this 11th day of September, 1950, at 2:20 P.M. from James Jackson. Statement taken by Louise Peters.

"Q. State your name, please.

"A. James Jackson.

"Q. Where do you live?

"A. 534 South Broadway.

"Q. How old are you?

"A. 34.

"Q. Are you married?

"A. Yes.

"Q. Do you have any children?

"A. Four.

"Q. Where do you work now?

"A. The Sucher Packing Company.

"Q. How long have you worked for Sucher's?

"A. About twelve years.

"Q. What are your duties at this time?

"A. Butcher.

"Q. James Jackson, I am about to take a statement from you regarding the theft of meats such as hams beef and bacon that was taken from The Sucher Packing Company over a period of time. Are you willing to give a true statement regarding your knowledge of thefts of this meat.

"A. That's right.

"Q. Do you realize that anything that you say could be used against you in any court of law having jurisdiction over this case?

"A. That's right.

"Q. Just state in your own words what you know about the theft of meats from Sucher Packing Company.

"A. Well, the only thing that I know about it William Harris asked me if I wanted to buy ham, and I told him 'No', that I didn't eat ham, and he asked me did I know of anybody that would want to buy any, and I told him 'No', but I would let him know and I told different ones about it.

"Q. Who did you tell about it?

"A. My brother, for instance.

"Q. What is his name?

"A. Arthur Jackson.

"Q. Where does he live?

"A. 70 Weller Street. He said 'Yes' he might have one, and I got the hams to take them to him.

"Q. Who else did you get orders from?

"A. There were just two people, my brother and Beulah.

"Q. Who is Beulah?

"A. The girl at the Classic Gardens.

Q. Did you talk to Gordon about hams?

A. Yes.

Q. Didn't Gordon order hams from you?

A. Yes, Gordon did.

Q. Didn't Bob Maiden talk to you about hams?

A. No, sir.

Q. Didn't Willie Early?

A. No, sir.

Q. What about Helen Hurt?

A. She definitely didn't talk to me about hams.

Q. But you did take orders and collect money from Beulah and Gordon and your brother?

A. That's right.

Q. How much money did you collect altogether?

A. Altogether about $25.00.

Q. How long have you been taking hams or having any knowledge of hams and other meats being taken from here?

A. About the last ten days.

Q. Wouldn't it be closer to say the last three weeks?

A. It would be too long.

Q. What about prior to the time of Harris?

A. I never carried out or sent anything out before that time.

Q. Did you take the order for six hams to be delivered to Gordon?

A. No, I didn't.

"Q. Did you take the order for the hams that were delivered to Beulah along with the pork loins?

"A. I know nothing of the pork or any beef.

"Q. What about some bacon?

"A. No bacon either.

"Q. But you did take orders for the hams from Gordon and from Beulah.

"A. That's right.

"Q. You put the hams in the barrel at different times so that William Harris could take these hams and put them in the trash truck?

"A. Me and Harris put them in the barrel together.

"Q. And this went on according to Harris's statement about almost every day?

"A. Definitely not.

"Q. About how often did you take it?

"A. I think it was twice last week.

"Q. You put some in the barrel Saturday?

"A. No, sir. I had to change clothes and get on the floor.

"Q. What about Friday?

"A. I think we did Friday.

"Q. How many did you put in the barrel on Friday?

"A. Three or four.

"Q. Is there any other information that you are withholding at this time that you want to clear up?

"A. No, sir, that's just about all.

"Q. You are willing to take a lie detector test to back up your statement. Is that true?

"A. That's right.

"Q. You have given me this statement of your own free will without being promised any immunity from prosecution or in any other manner given concessions?

"A. That's right.

"Q. Are you willing to sign this as a true statement?

"A. Yes. I'll sign it.

s/ James Jackson

"WITNESS

"F. E. Merica

"K. E. Smith"

Or was it that taken by Petitioner when on the morning of trial it withdrew all claims for loss of beef and veal notwithstanding its position that its exhibits which continued to include such loss should go to the Jury?

There is no case cited to this Honorable Court in which counsel has taken so many inconsistent positions and accordingly, the decision of affirmance by the Appellate Court is in every respect correct.

Even if Petitioner had been consistent in its position its inventory records would not be competent.

Evidence which shows that the "unexplained loss" may have been the result of various causes and only furnishes a choice among different possibilities is not competent. The jury is not permitted to guess and speculate on which cause or possibility is the basis for petitioner's "loss". *Ewing* v. *Goode* (6 Cir.) 78 Fed. 442, 444; *Grand Trunk R.R. Co.* v. *Holstein* (6 Cir.) 67 Fed. (2d) 780; *Cobb* v. *American Bonding Co.*, 118 Fed. (2d) 643; *New Amsterdam Cas. Co.* v. *W. D. Felder Co.*, 214 Fed. (2d) 825 Syl. 3; *Gedra* v. *Dallmer Co.*, 153 Ohio St., 258, 91 N.E. (2d) 256; *Kruper* v. *Procter & Gamble Co.*, 160 Ohio St. 489, 117 N.E. (2d) 7; *Gerick* v. *Republic Steel Co.*, 153 Ohio St., 463, 92 N.E. (2d) 393; *Stanley* v. *National Surety Co.*, 39 N.Y.S. (2d) 509.

CONCLUSION

Petitioner seeks to have this Honorable Court interpret various Rules of Civil Procedure which need no interpretation under the evidence in the instant case.

It was the constant change and modification of Petitioner's position in its attempt to recover $162,000.00 "unexplained loss" because of theft that exhaustive investiga-

tion disclosed caused a $291.00 loss that has caused all the confusion.

Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
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Clerk

No. 716

In The

Supreme Court of The United States

October Term, 1957

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Respondent contends the Petition for a writ of Certiorari should be denied.

While Petitioner in this Court, as in the Appellate Court, propounds numerous questions, the real purpose for this Petition for Certiorari is to attempt to have this Honorable Court review the decision of the Appellate Court affirming the action of the Trial Court excluding Petitioner's records of inventory shortage from the con-

(* Figures in parenthesis refer to pages of the printed Record.)

sideration of the Jury and refusing to allow, over objection, a private detective employed by Petitioner who had taken a signed statement from James Jackson, to testify that James Jackson had orally stated that he had been stealing from Petitioner for five years where such witness called by Petitioner refused to testify.

QUESTIONS PRESENTED

1. Is the Trial Court correct in withdrawing from the consideration of the Jury Inventory Records based upon approximate figures which are uncertain and deficient and contain many errors?

2. Is the Trial Court correct in refusing to admit in evidence an oral statement of a witness made to a third party that the witness had been stealing from Petitioner for five years where the witness has given a signed confession to the third party which petitioner refused to produce and the oral statement does not relate to the theft of meat products, nor to the theft of the specific meat products in question, nor to the period for which plaintiff seeks to recover, and it is necessary to predicate an inference upon an inference

STATEMENT OF THE CASE

Petitioner has failed to serve Respondent with a copy of any portion of the record filed with the clerk of this Honorable Court.

Petitioner does not undertake to state the facts in clear and concise chronological order, but intermingles opinions, arguments, conclusions and statements, which are frequently unsupported on the pages cited by petitioner.

Petitioner's statement omits the following pertinent, essential facts.

(1) The alleged unexplained inventory loss was determined by adding the alleged gains and shrinks shown in each weekly inventory (7b, 8b) subtracting the gains from the shrinks and labeling the remainder "unexplained loss" (38b, 40b, 41b). No audit being attempted (15b, 41b).

(2) The alleged unexplained loss or shrink could come from errors in transfer, errors in taking the inventory, additional shrink due to spoilage, mistakes, improper shrinkage factors or theft (12b, 26b, 27b, 28b, 37b, 38b, 39b, 42b).

(3) The shortage complained of was based upon approximate inventories (7b, 8b, 19b).

(4) Petitioner's auditor would not certify to the accuracy of the figures contained in the weekly production analysis sheets from which the inventory loss was prepared (44b).

(5) Petitioner had no records to show its shrink experience (6b, 20b, 52b, 53b). Shrink experience was never determined from any audit (41b) and no shrink tests were made (47b, 48b).

(6) The only accurate inventory was that taken by petitioner's auditors at the fiscal close and this inventory was never given to the accountant who prepared the inventory shortage (7b, 24b, 25b, 26b). This inventory was frequently demanded but never produced during the trial.

(7) That there were substantial shrink shortages for the weeks immediately after Harris was apprehended on September 11, 1950, (23b) and petitioner's analysis sheets still provide for weekly shrinks and gains (30b, 43b).

(8) There were no records kept by petitioner of the meat employees were permitted to take for use in the cafeteria (26b, 48b, 49b).

(9) Petitioner is unable to say what amount of meat anyone was charged with stealing (33b, 34b).

(10) That "gambrels", from which the hog is hung, were weighed with the hog as the hog entered the cooler and removed when the hog entered the cutting room (21b, 22b,

23b. Deft's. Ex. G). No credit was ever allowed for the weight of the "gambrels".

(11) There were no reports of anyone wrongfully removing meat from petitioner's plant (30b. 46b. 47b).

(12) Air circulation, temperature, refrigeration, humidity, source and feeding of the hog all have a definite affect on shrinkage (53b. 54b. 55b. 56b). There were no records produced for the periods claimed, for any of these factors (53b).

(13) Petitioner's records show that William Harris was employed July 26. 1950 (19b. 20b. 32b).

(14) Petitioner refused to produce and offer the signed statement of James Jackson or any other employee even though defendant moved for such production (71b).

(15) Dressed whole hog sales were included in the inventory, but accruate records of such sales were not produced, although promised (22b) and the volume of bone removed in preparing pork hotel cuts was not known (49b).

(16) There was no allowance for meat spoilage during the three years for which claim was being presented.

(17) James Jackson never observed any unidentified employee take meat products from petitioners plant.

ARGUMENT

QUESTION 1

Petitioner in the Appellate Court candidly admitted that "the exclusion of appellants records was the most grievous error."

Because of petitioner's position the Appellate Court, after a careful analysis of the evidence, which petitioner now criticizes and contends was improper, said, in part:

> The complaint, filed by appellant, and the numerous amended complaints subsequently filed, embody

ing its changing contentions during the trial of the case, foreshadow the uncertainties of appellant's claims and proofs. On September 2, 1952, the complaint was filed; thereafter, an amended complaint, and a second amended complaint were filed. The second amended complaint was amended during the trial, and thereafter, again amended during the last day of the trial. The amended complaints withdrew claims of losses by theft of beef and veal from $9,620.91 to no loss whatever; of loss by theft of sausage from $12,546.74 to $10,392.74—and subsequently the claim for loss from sausage was entirely withdrawn; and, finally, complainant made an allowance for meat consumed by its employees in its cafeteria, which had previously been claimed as a loss by theft.

* * *

The foregoing, then, discloses that appellant first withdrew all claims for losses by theft of beef and veal, because it could not prove them. It then withdrew all claim for losses by theft of sausage, because it could not prove them. It then, in effect, withdrew all claims for losses by theft caused by unidentifiable employees as a class, because it could not prove them. It finally withdrew all claims for inventory shortage caused by dishonesty of employees because it could not prove them.

* * *

The records contained too many errors, uncertainties and approximations to enable a jury to draw any conclusion, except unwarranted speculation, from them, in arriving at an inventory shortage conclusively proving losses caused by the dishonesty of employees. The claimed inventory shortages would seem to be equally valueless to corroborate proof of theft by individual employees.

Even though it would appear that Petitioner's position had been made crystal clear when counsel said to the jury:

(Tr. 1153)

I submit to you, ladies and gentlemen, that in this case your problem has been much simplified by his Honor's ruling out all the figures which would have been a very difficult job. It involved a lot more work and even manpower in lugging the exhibits. You have a very simple fact to determine at this time."

It is obvious that the Appellate Court considered "the most grievous error" complained of by Petitioner as though Petitioner had fully and completely complied with Rule 51 of the Federal Rules of Civil Procedure and made its position clear to the Trial Court and noted its exceptions when the court said in its opinion:

> Even if appellant had requested the court to charge that its records showing inventory shortage could be considered by the jury as corroborating the direct evidence of appellant's loss by theft—and had duly excepted to the failure of the court so to instruct—it is doubtful that the court's refusal to give such requested instruction could be considered error under the circumstances of this case. Plaintiff's proofs of inventory shortage, and the records and computations made by them for the purpose of such proof, are uncertain and deficient."

As the Lower Court in its determination of this appeal assumed that Rule 51 had been fully complied with by Petitioner, the contention of Petitioner that this question was not saved for review is without foundation and contrary to the fact and there is no conflict.

QUESTION 2

Petitioner had refused to produce the written signed confession of James Jackson. The cases cited by Petitioner clearly disclosed that the statement admitted related to

the very issue involved. Petitioner said that if Merica had been allowed to testify he would say that Jackson said "he had been stealing from Sucher Packing Company for five years."

The period for which Petitioner sought to recover was two years. Petitioner sought to recover for loss of specific meat products. To be pertinent it would be necessary to predicate an inference upon an inference. The Trial Court correctly excluded the statement and no error occurred.

Evidence which requires superposing of inference does not constitute evidence. *Parker* v. *Gulf Refining Co.* (6 Cir.) 80 Fed. (2d) 795, Syl. 1; *O'Mara* v. *Pensy. R.R. Co.* (6 Cir.) 93 Fed. (2d) 762; *Commercial Standard Ins. Co.* v. *Gordons Transports Inc.* (6 Cir.) 154 Fed. (2d) 390, Syl. 6; *Westland Oil Co.* v. *Firestone Tire and Rubber Co.* (8 Cir.) 143 Fed. (2d) 326, Syl. 11; *Franklin* v. *Shelly Oil Co.* (10 Cir.) 141 Fed. (2d) 568, Syl. 7.

Petitioner's reference to harmless error and its application to the exclusion of Jackson's statement to Merica is based upon Petitioner's erroneous interpretation of the decision of the Appellate Court.

The Appellate Court held Jackson's statement inadmissible but went on to say that even if it be assumed that the Court erred, such error was not reversible in view of the evidence of the various instances where losses occurred, the deficiency in proof as to what and how much was stolen.

The alleged conflicts claimed by Petitioner do not exist as the Appellate Court considered all of the numerous questions presented by Petitioner as if Petitioner had taken every action required of him to reserve every question presented to the Appellate Court and determined that even then there was no merit to Petitioner's numerous

claims of error and particularly to the most grievous error which Petitioner claimed arose when the Trial Court surveyed Petitioner's hodge podge of statistics, the variables, the various changes in exhibits which Petitioner offered as correct documents, the various averaged credits, the approximated inventories, the absence of the fiscal end inventory, the boxes full of exhibits, the absence of records of material conditions that affect shrink, the refusal of the certified public accountant to certify his result, or the correctness of Petitioners figures, the admission that the inventory shortage was as attributable to mistakes, spoilage, errors in transfer, improper shrinkage factors, errors in taking the inventory as from theft and, refused to allow the Jury to guess and speculate by withdrawing the inventory shortage from the consideration of the Jury which was the only thing he could do under the circumstances.

The decisions of the Trial Court and the Appellate Court turn solely upon an analysis of the evidence in this particular case.

The decision is important only to Petitioner and Respondent. The "narrow boiders" complained of by Petitioner arise because of the constant, repeated attempts on the part of Petitioner to substitute speculation for proof

CONCLUSION

We respectfully submit that the petition for a Writ of Certiorari should be denied.

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